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PREFACE

The Preface which appears in the volume covering the year 1953 applies also to the present volume.

H. LAUTERPACHT

Cambridge,
August 1957.

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LIST OF ABBREVIATIONS

OF TITLES OF COLLECTIONS OF DECISIONS, LAW REPORTS, PERIODICALS, ETC., QUOTED IN THE TEXT

A.C. = British House of Lords and Judicial Committee of the Privy Council.
A.I.R. = The All India Reporter.
All E.R. = The All England Law Reports.
Annual Digest = Annual Digest and Reports of Public International Law Cases.
App. Div. = Supreme Court Reports (New York), Appellate Division.
BGHSt. = Entscheidungen des Bundesgerichtshofes in Strafsachen (Germany).
BGHZ = Entscheidungen des Bundesgerichtshofes in Zivilsachen (Germany).
C.A.R. (U.S.) = Court of Appeals Reports of the United States Courts of the Allied High Commission for Germany.
Clunet = Clunet, Journal du Droit international.
C.M.R. = Court Martial Reports (United States).
Ct. Cl. = Court of Claims Reports (United States).
Dalloz = Recueil périodique et critique de Jurisprudence, de Législation et de Doctrine (founded by Dalloz) (merged with Sirey, 1955).
Dalloz et Sirey = Recueils Dalloz et Sirey de doctrine, de jurisprudence et de législation (1955–current).
D.L.R. = Dominion Law Reports (Canada).
F. (or Fed.) = Federal Reporter (United States).
F. 2d = Federal Reporter (Second Series).
F. Supp. = Federal Supplement (United States).
I.C.J. Reports = International Court of Justice, Reports of Judgments, Advisory Opinions and Orders.
JZ = Juristenzeitung (Germany).
L.Ed. = Supreme Court Report, Lawyers' Edition (United States).
L.R. = Law Reports (England).
N.E. 2d = Northeastern Reporter, Second Series (United States).
N.J. = Nederlandse Jurisprudentie (Holland).
NJW = Neue Juristische Wochenschrift (Germany).
N.Y.S[upp]. = New York Supplement.

N.Z.L.R. =New Zealand Law Reports.

Ob. =Oberster Gerichtshof (Austria).

Pak.L.R. (or P.L.R.) =Pakistan Law Reports.

PEPSU =Patiala and East Punjab States Union.

Q.B. (or Q.B.D.) =Queen's Bench Division of the English High Court of Justice.

Rt. =Norsk Rettstidende (Norwegian Law Journal).

S.A. (or S.A.L.R.) =South African Law Reports.

S.C. =Session Cases (Scotland).

S.Ct. =Supreme Court Reporter (United States).

Settlement of Claims, 1949–1955 =Settlement of Claims by the Foreign Claims Settlement Commission of the United States and its Predecessors from September 14, 1949 to March 31, 1955.

Sirey =Recueil général des Lois et des Arrêts (founded by Sirey) (merged with Dalloz, 1955).

Tijdschrift =Nederlands Tijdschrift voor Internationaal Recht (Netherlands International Law Review).

U.S. =United States Reporter (Supreme Court).

U.S.C.A. =United States Code Annotated.

U.S.C.M.A. =United States Court of Military Appeals Reports.

VfGH =Sammlung der Erkenntnisse und wichtigsten Beschlüsse des Verfassungsgerichtshofs, New Series (Austria).

VwGH(A) =Erkenntnisse und Beschlüsse des Verwaltungsgerichtshofes, New Series (Administrative Law) (Austria).

VwGH(F) =Erkenntnisse und Beschlüsse des Verwaltungsgerichtshofes, New Series (Law relating to Finance) (Austria).

W.L.R. =Weekly Law Reports (England).

CLASSIFICATION

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PART I

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II.—Sources

[*See also* PART X, DISPUTES: A, I, ii, Arbitration: The Law Applied by Arbitral Tribunals.]

International Law—Sources of—Custom—Termination of—Requirement of Express Renunciation of Rights Acquired by Custom.

See p. 136 (*Mackay Radio and Telegraph Company* v. *Lal-la Fatma Bent Si Mohamed El Khadar and Others*).

III.—Subjects of International Law

[*See also* PART VI, THE INDIVIDUAL IN INTERNATIONAL LAW: A, In General; *and* PART VIII, TREATIES: IX, Operation and Enforcement of Treaties.]

International Law—Subjects of—Individuals as Direct Beneficiaries of Treaties.

See p. 3 (*Public Prosecutor* v. *J. de B.*).

IV.—Relation to Municipal Law

[*See also* PART VIII, TREATIES: IX, Operation and Enforcement of Treaties, Necessity for Municipal Legislation; *and* PART VI, THE INDIVIDUAL IN INTERNATIONAL LAW: A, In General.]

International Law—Relation to Municipal Law—The Law of France—Geneva Convention of October 28, 1933, Relating to Status of Refugees—Rights of Refugees under Convention—Status of Armenian Refugees in France.

ALLAHVERDI *v.* LANAUZE.

France, Court of Appeal of Paris. February 20, 1954.

THE FACTS.—The appellant was an Armenian refugee whose action for reinstatement in a dwelling-house occupied by the cross-appellant, a French citizen, had been dismissed by the Court of first instance, on the ground that the relevant provisions of the Law of September 1, 1948, which would have given the appellant a right to reinstatement if he had been a French citizen, were not applicable to aliens. On behalf of the appellant it was contended that a French Law of 1943 provided that all enactments governing the law of landlord and tenant applied to foreign citizens whose national laws conferred reciprocal rights on French citizens. It was further contended that as he, the appellant, was a person entitled to the status of a refugee within the meaning of the Geneva Convention on Refugees of October 28, 1933, which provided that privileges accorded to such persons should not be refused on the ground of lack of reciprocity in their countries of origin, he was entitled to the same treatment as a French citizen and therefore had a right to reinstatement.

Held: that the appellant's contention must be upheld and the appeal allowed, but that the merits of the case could not be determined until further factual evidence became available.

The Court said: " The Law of May 28, 1943, which provides that the enactments governing the law of landlord and tenant shall be applicable to aliens, lays down in Article 1 that, notwithstanding any restrictive provisions, the said enactments shall apply to the nationals of those countries which confer identical benefits on French citizens, as well as to those aliens who, by virtue of an international convention, are exempt from the requirement of reciprocity. Article 26 of the French Constitution of October 27, 1946, provides that treaties which have been properly ratified and published shall have the force of law even if contrary to French municipal law, without the need for the enactment of any legislative measures other than those required to ensure their ratification. There is in existence a Convention relating to the Status of Refugees which was signed at Geneva on October 28, 1933, approved by a French Law of October 30, 1936, promulgated on December 3, 1936, and published in the *Journal Officiel* of the French Republic on December 5, 1936. This Convention, which was stated to be applicable to Russian and Armenian refugees (Article 1), provides in Article 14 that the enjoyment of certain rights accorded to aliens on condition of reciprocity shall not be refused to refugees on the ground of lack of reciprocity. The reservations which were made by the French representative when the Convention was signed were concerned only with the proportionate number of foreign employees whom employers are permitted to employ in France, with the powers of the Commissions set up under Article 15, and with the application of the Convention to French colonies and overseas territories. It follows from a reading of all these instruments that Allahverdi, who is an Armenian refugee, is exempt from the requirement of reciprocity by virtue of the Convention of October 28, 1933, and that the restrictive provisions of Article 19 of the Law of September 1, 1948, cannot be relied upon as against him. The contention put forward on behalf of Lanauze, to the effect that the provisions of the Geneva Convention of July 25, 1951, can be relied upon as against those of the Convention of 1933, which are applied in the present judgment, cannot be upheld. The Convention of 1951 cannot be applied in this country because it has not yet been approved by a French law and has therefore been neither promulgated nor adopted in France.[1] Furthermore, paragraph 15 of the Annex upon which Lanauze relies more especially can only be read in conjunction with Article 1, which defines the term " refugee " and applies without any doubt whatever to Allahverdi. Finally, the new provisions, far from worsening the position of those whom they are designed to protect, have the object, by virtue of the combined application of paragraphs 3 and 5 of Article 7, and of Article 13 concerning moveable and immoveable property and rights appertaining thereto, of even increasing benefits resulting from previous Conventions.

" The Court cannot at present adjudicate upon the merits, for lack of sufficient evidence. It finds that Allahverdi is entitled, as an Armenian refugee, to benefit from the right to reinstatement provided for in Article 19 of the Law of September 1, 1948."

[Report: *Revue critique de droit international privé*, 43 (1954), p. 774.]

International Law—Relation to Municipal Law—Legislation Inconsistent with Treaty Obligations—Validity of—The Law of Holland—Convention of Mannheim of 1868 concerning Navigation on the Rhine and Netherlands Inland Navigation Legislation—Freedom of Navigation—Denial of Freedom of Navigation to the State's Own Subjects—Direct Conferment of Treaty Rights upon Individuals—*Travaux préparatoires*.

PUBLIC PROSECUTOR *v.* J. DE B.

Holland, District Court of Rotterdam. May 21, 1953.
Supreme Court. May 4, 1954.

THE FACTS.—On or about June 12, 1952, the defendant had, in her capacity as managing director of a shipping company in Rotterdam, given instructions to enter into a freight agreement for a ship belonging to that company and lying ready at Heesselt on the River Waal for conveyance to and from Heesselt to Rotterdam, without reference to the Affreightments Committee at Heesselt. Article 2 of the Inland Navigation Rules of 1947 makes permission to enter into freight agreements dependent on the authorization by the local officer of the Affreightments Committee competent on the spot where the vessel so to be chartered is ready to be freighted. Infringement of this provision is punishable in pursuance of Article 9 of the Inland Shipping Decree, 1941. The defendant was summoned before the Cantonal Court at Rotterdam. This Court discharged her on the ground that the charge against her, though proven, did not constitute an indictable offence because the Decree of 1941 and the

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[1] The Convention was ratified by France on June 23, 1954, and published in the *Journal Officiel* of October 29, 1954.

Rules of 1947 were contrary to the provisions of the Revised Convention of Mannheim of 1868 concerning Navigation on the Rhine (hereinafter called the Rhine Convention). The relevant provisions of the Convention are set out in the *Held* below.

The Prosecuting Crown Counsel at the Cantonal Court appealed to the District Court of Rotterdam.

Held (by the District Court): that the judgment of the Court below must be confirmed.

The Court said: " Article 1 of the Rhine Convention provides as follows:

> ' La navigation du Rhin et de ses embouchures, depuis Bâle jusqu'à la pleine mer, soit en descendant soit en remontant, sera libre aux navires de toutes les nations pour le transport des marchandises et des personnes, à la condition de se conformer aux stipulations contenues dans la présente Convention et aux mesures prescrites pour le maintien de la sécurité générale.
>
> Sauf ces règlements, il ne sera apporté aucun obstacle, quel qu'il soit, à la libre navigation. Le Leck et le Waal sont considérés comme faisant parties du Rhin.'

" The term ' navigation ' in this provision refers not only to actual conveyance and transport but also to loading and unloading of ships taking part in navigation on the Rhine, as well as on its tributaries Lek and Waal and on other waterways leading to the sea. This appears from Articles 5, 7, 11 and 27 of the Convention. Article 1 cannot be interpreted in any other way but that the States pledged to this Convention grant to the ships of all nations free navigation on the Rhine, on the Rivers Waal and Lek, as well as on their outlets to the sea. Neither are the Signatories permitted to deny such freedom to their own subjects. According to the principles of Netherlands Constitutional Law, rights and obligations of Netherlands subjects can be created by the mere coming into operation of an international Convention to which the Netherlands have become a party and in which such rights and obligations have been laid down. Ever since it became effective in 1869, the Rhine Convention was held to be in force in the Netherlands, and it was still binding in June 1952. From the wording of the Inland Shipping Decree, 1941, and of the Inland Navigation Rules, 1947, nothing else can be deduced but that the obligations formulated therein generally apply to inland shipping throughout the Netherlands, without any exception being made for navigation on the Rhine, the Waal, the Lek and the waterways flowing from these rivers to the open sea.

" The point at issue in the present case is the conveyance of a cargo of sand on the rivers Waal, the Lower Merwede, the Noord and the Nieuwe Maas with destination Rotterdam, all of which are waterways to which the freedom of navigation under the Rhine Convention applies and did apply. Under said Decree and Rules, the shipping company under the management of the defendant was bound to enter into the freight agreement in question through the competent officer of the Affreightments Committee, and failure to comply with this obligation was liable to punishment. According to Article 1 of the Convention, no impediments of whatever nature may be put in the way of the freedom of navigation, which—subject to certain exceptions not relevant in this case—also includes the freedom of loading and unloading.

"Inasmuch as provisions like Article 2 of the Inland Navigation Rules, 1947, interfere with that freedom, they are, to the extent to which they relate to the water area of the Rhine, contrary to the provisions of Article 1 of that Convention. The Netherlands State organs in whom legislative powers are vested, when enacting legislative measures cannot do so contrary to agreements entered into under the law of nations which are still in force, as such agreements are accepted in the Netherlands legal system as rules of international public law. Since they were brought into being by consensus of *all* contracting parties, they can only be modified or terminated by *all* of them jointly, or by some other method of modification or termination permissible in international law. The legislative organs of one of the Parties to the Treaty alone cannot do so. Domestic legislation contrary to an international Convention binding upon the country and its subjects cannot therefore be held to be valid. Article 1 of the Decree of 1941 and Article 2 of the Rules of 1947, in so far as they relate to the waterways covered by the Rhine Convention, have no binding force. Therefore, though the facts as to the defendant have been proven, they do not constitute an offence."

The Public Prosecutor at the District Court of Rotterdam appealed from this judgment to the Supreme Court (in its capacity as a *Cour de Cassation*). In his plea for *cassation* the Public Prosecutor argued on the following alternative grounds: (1) The District Court was under a misapprehension when holding that Article 2 of the Inland Navigation Rules, 1947, had no binding force for the water area of the Rhine on the ground that it was contrary to the Rhine Convention. The Court erred because this Convention only intends to regulate international relations and in particular foreign navigation on the Rhine or commercial interests concerned with it. The Convention leaves the individual riparian State free to bind its nationals by means of statutory rules which aim at an efficient co-ordination of transport in its own country. Navigation by Dutch nationals within the Netherlands in the area covered by the Convention was a matter of domestic jurisdiction which was not governed by any international agreement. (2) Even if Article 2 of the Inland Navigation Rules, 1947, as regards the water area concerned should be contrary to the Rhine Convention, these Rules would none the less have the force of law until their formal repeal by the competent authority, because the term " law " in Article 5 of the Act of May 15, 1829 (General Provisions for the Legislation of the Realm), as amended, was to be understood in the substantive sense of conveying the idea of rules of a generally obligatory character. (The amendment provides that a law will only lose its binding force, wholly or in part, on the enactment of a subsequent law.)

Held (by the Supreme Court): that the appeal must fail.

The Court said: "Article 2 of the Inland Navigation Rules, 1947, does not distinguish as to the courses on which—or as to the ship in which—the water transport takes place, nor as to the persons concerned with such carriage. The question must be examined whether or not the binding force of Article 2 is being impaired by the Rhine Convention in so far as the latter should prohibit any limitation of the freedom of navigation on the Rhine. In Article 108 of the Final Act of the Congress of Vienna of 1815, it was agreed that States separated by rivers through which one and the same river runs were to open negotiations with one another for the adjustment of all matters concerning navigation on such waterways, which should be free for their whole length and for each and everyone, and that police regulations bearing on such navigation should be equal and as favourable as possible to all. That principle was further elaborated in the Convention of Mayence of March 31, 1831. Article 1 of that Convention reads:

> 'La navigation dans tout le cours du Rhin, du point où il devient navigable jusqu'à la mer, soit en descendant, soit en remontant, sera entièrement libre et ne pourra, sous le rapport du commerce, être interdite à personne, en se conformant toutefois aux règlements de police exigés pour le maintien de la sûreté générale, et aux dispositions arrêtées par le présent règlement.'

Article 2 provides that the provisions concerning the Rhine also apply to the rivers Lek and Waal. . . . Moreover, Article 46 of the Convention provides:

> 'Le transport de personnes, chevaux, voitures, effets et autres objects d'une rive à l'autre, et ce qui tient au commerce ordinaire des deux rives n'a rien de commun avec le présent règlement, non plus que la navigation d'un patron ou conducteur restreint à l'exercer dans l'enceinte du territoire de son souverain, sans en dépasser les limites, un tel patron ou conducteur n'étant assujetti qu'aux autorités du pays où il exerce son métier.'

The Mayence Convention was subsequently superseded in 1868 by the Rhine Convention, which, according to its Preamble, was deemed to be necessary in view of the modifications that in the course of time had been introduced into the Convention of Mayence and because of changed shipping conditions. It was, however, the general wish to maintain the basic principle of free navigation on the Rhine, from now on embodied in Article 1 of the new Convention, whilst Article 4 guarantees non-discrimination in the treatment of all ships participating in navigation on the Rhine and their cargoes. Article 4 therefore provides:

> ' Pour ce qui concerne les voies navigables mentionnées au premier alinéa de l'article 3, le traitement national, sous tous les rapports, sera accordé aux navires appartenant à la navigation du Rhin et à leurs chargements.'

" From all this it appears that the Rhine Convention establishes rules for the freedom of navigation on the Rhine, but that, although it prohibits the High Contracting Powers from issuing discriminatory regulations and provisions, it does not contain any specific reference in actual words to the competence of each riparian State to establish rules for inland navigation in respect of ships of its own subjects. As to the latter, the draft for a new Treaty submitted by the Prussian Government in its proposal to convene an international conference for the revision of the Mayence Convention of September 1867, suggested in Article 22 that the provisions of the Convention should not be applicable to the ferries mentioned therein. By way of comment on this Article the Prussian Government observed that it corresponded with the first sentence of Article 46 of the Mayence Convention and that the further contents of that Article had been omitted ' as a matter of course.' In so reasoning the Prussian Government evidently proceeded from the understanding that the Convention left unimpaired the competence of each riparian State to take such measures as it deemed fit with respect to navigation in which its own subjects take part with inland vessels and which is confined to its own territory. The draft Article 22 was then incorporated, without further substantial discussion, in the Rhine Convention as Article 24. As appears from the above, the Convention must be considered as having indeed intended to leave open the possibility of a restriction of free navigation on the Rhine, but only with regard to such navigation as is pursued by the subjects of any one State within its own borders. Binding force must therefore be denied to Article 2 of the Inland Navigation Rules, 1947, in so far as this provision, owing to the general terms in which it is couched, disregards that limitation.

" It would not, however, be a legitimate inference from this to hold that the said Rules are thus deprived completely of their legal basis in the sense that their applicability should be excluded also with regard to water courses other than those to which the Rhine Convention refers. Yet, the fact that Article 2 of the Rules has no binding force in respect of Rhine navigation other than that carried on by nationals of a State within its own borders, must result in its ineffectiveness also in regard to the latter navigation, since there is no sufficient reason to assume that at the time of the promulgation of these Rules they were intended to become operative exclusively for the purposes of purely inland Rhine navigation if they were to be held ineffective in respect of the other branch of navigation, that is, international navigation."

As to the alternative ground, the Court said that it was of no avail because, apart from Article 65 of the Constitution which had since become operative, a Ministerial Decree, even though it should be regarded as a " law " in the substantive sense, could not be held valid if it were contrary to an international convention.

[Reports: *N.J.*, 1954, No. 382; *Tijdschrift*, vol. II, pp. 94 *ff.*[1]]

NOTE.—The Supreme Court had in the past decided more than once that by entering into international agreements in the constitutional form the King directly creates rights and obligations for Netherlands citizens (*cf.* the decision of the Supreme Court of May 23, 1906, W. 8383). Since June 22, 1953, this principle has been adopted in Article 66 of the Netherlands Constitution: " Agreements, if published, shall only be binding on citizens . . . "

Article 65 of the Constitution, to which the Supreme Court referred in connection with the alternative ground for *cassation*, became effective on June 22, 1953. It provides: " If any legislative provision in force in the Realm is or becomes incompatible with any agreement published in conformity with Article 66 before or after the enactment of the provision, then the provision ceases to be applicable."

Since this provision has become effective, a long-standing controversy has been brought to an end in favour of the directly-binding force of international agreements, which are wider than Netherlands domestic law. Netherlands courts may no longer apply Netherlands law (Acts of Parliament) which are contrary to an international agreement. In the past, the Supreme Court had always avoided this controversy by denying the existence of a conflict between a prior international agreement and a subsequent law. The Court did so by interpreting either the law or the agreement in such a way as to obviate a conflict.

International Law—Relation to Municipal Law—Treaty providing for Exemption of Aliens from " Extraordinary Conributions "—Question of Exemption a Matter of Public Policy—Whether Judiciary or Executive Competent to Determine Question of Exemption—The Law of France.

See p. 280 (*Kirby, Beard and Co., Ltd.* v. *Directeur-Général des Impôts*).

International Law—Relation to Municipal Law—Supremacy of Treaty—Interpretation of Treaty—Question of " International Public Policy " in Treaty—Whether Judiciary or Executive Competent to Determine Such Question—The Law of France.

See p. 277 (*Estades* v. *French Government*).

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[1] A Note by Judge Erades of the Rotterdam District Court in this issue of the *Tijdschrift* comments extensively on these cases.

International Law—Relation to Municipal Law—Treaty Providing for National Treatment of Aliens—Conflicting Municipal Law—The Law of France.

See p. 281 (*Ministère Public* v. *Carillo-Frontello*).

International Law — Relation to Municipal Law — Treaties — Supremacy of Municipal Law—The Law of Israel.

See p. 236 (*Waskerz* v. *Attorney-General.*)

International Law—Relation to Municipal Law—Incorporation of Treaty into Municipal Statute—Whether Text of Treaty may be Consulted in Interpreting Statute.

See p. 297 (*Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ld.*).

International Law—Relation to Municipal Law—Treaties—Supremacy of Prior Municipal Law.

See p. 168 (*Deportation* (*Greece*) *Case*).

International Law—Relation to Municipal Law—Municipal Statute Subject to Treaty Provisions—Interpretation—International Convention for the Protection of Industrial Property, 1934—Patents Act, 1949.

See p. 258 (*Parke Davis & Co.* v. *Comptroller of Patents, Designs and Trade Marks and Another*).

International Law—Relation to Municipal Law—Primacy of Municipal Law—The Law of India.

See p. 272 (*Sharma* v. *State of West Bengal and Others*).

PART II

STATES AS INTERNATIONAL PERSONS

A—IN GENERAL

II.—Sovereignty and Independence

i.—In Foreign Relations

[*See also below,* IV, Recognition of Acts of Foreign States and Governments; PART IV, JURISDICTION; *and* PART VIII, TREATIES: XII, Interpretation of Treaties, ii. Principles and Rules of Interpretation.

States—Sovereignty and Independence—Dignity—Insulting the Head of a Foreign State—Legitimacy of Origin—Distinction between Head of State and Leader of a Party—Spain and the Netherlands in 1951.

PUBLIC PROSECUTOR *v.* T.J.

Holland, Court of Appeal of 's-Hertogenbosch. March 17, 1954.

THE FACTS.—Article 117 of the Netherlands Criminal Code provides that anyone intentionally insulting a ruling Sovereign or other Head of a friendly State shall be punished with imprisonment for not more than four years or a fine of not more than three hundred guilders. The defendant, in a speech at an open air meeting on July 20, 1951, had declared: " We now see that the American Ambassador has left for Spain and concluded a treaty with the professional murderer Franco." He was prosecuted on account of that speech. Counsel for the defence submitted the following plea: (1) The intention of the defendant was not to insult a Head of State, as it was his opinion that the Head of the legitimate Spanish Government was outside Spain; his statement referred to General Franco; (2) the intention of Article 117 is to protect the Head of State as a non-partisan figure and not a person who—like Franco—is also the leader of a party; and such protection *a fortiori* cannot be intended for such persons as have come into power by unlawful means.

Held: that neither the wording nor the legislative history of Article 117 supported the view that it had been the intention of the Legislature to protect the foreign Head of State only in his official capacity.

The Court said: " The question need not be considered whether it can be argued that on July 20, 1951, there was some flaw in the legitimacy of the administration in Spain. Article 117 cannot be interpreted as restricting protection to a non-partisan figure. This Article only deals with an intentional insult directed against the Head of a friendly State. In July 1951 everybody in the Netherlands knew that Franco was the Head of the State of Spain, and that Spain is a State with which the Netherlands maintain friendly relations. There is no evidence that the defendant was not aware of this at the time."

[Report: *N.J.*, 1954, No. 649.]

States—Sovereignty and Independence—Foreign Relations—States Acting as Agents for One Another—Whether So Regarded in Municipal Courts—The Law of India—The Law of Pakistan.

BENGAL STORES *v.* DOMINION OF PAKISTAN, EAST BENGAL CIRCLE.

Pakistan, High Court of Dacca (Civil Revisional). February 5, 1954. (Akbar J.)

THE FACTS.—The petitioner sent certain goods in a package by post from Calcutta in India to Barisal in Pakistan. Upon their arrival it was found that some of the goods were missing from the package, and that the package itself had been damaged. The petitioner contended that he had contracted with the Indian Post Office to deliver the goods safely and that the Post Office of Pakistan was the agent of the Indian Post Office and therefore liable for the goods lost in transit. The defendants alleged that they had delivered the package as it had come to them from India and that any loss or damage had occurred before it reached Pakistan, and hence that they could not be held liable. In the Court of First Instance at Barisal, the petitioner's claim was dismissed, but he now petitioned for a revision of that decision.

Held: that the petition must be dismissed. The Pakistani authorities were not liable for the loss of the goods or for the damage to the package. One independent Sovereign is not the agent of another sovereign Power as far as municipal courts are concerned unless the relationship of agency is assumed, specifically and for a particular purpose, and the courts are given jurisdiction. In this case the Dominion of Pakistan could not be sued as agent for the Union of India.

Akbar J. said: ". . . To succeed in this case the plaintiffs must establish a contractual relation between them and the defendants. There is nothing . . . to show that these defendants were contracting parties. . . . Can these defendants be treated as agents of the other Dominion? No such case has . . . been made out . . . A similar question arose in the case of *Union of India* v. *Brajen Saha* [57 C.W.N. 164] and at page 166 Chunder J. observed as follows:

> 'It is clear (law) that one independent Sovereign power is not the agent of another independent Sovereign power as far as Municipal

> Courts are concerned unless specifically such a state of agency is for a particular purpose assumed and the Courts given jurisdiction. This has to be pointed out, because, it is said that the Government of India may be sued here as an agent of the Pakistan Government. This is not good law as the two countries are independent Sovereign powers.'

I respectfully agree with the above observations. . . ."

[Report: Pak.L.R. (1954) 4 Dacca 1954.]

Sovereignty and Independence—Foreign States—Right to Sue in Matters Affecting their Public Interest.

See p. 265 (*Bulgarian State* v. *Takvorian*).

iii.—Conduct of Foreign Relations. Conclusiveness of Statements of the Executive

States—Sovereignty and Independence—Conduct of Foreign Relations—Sovereign Acts in the Sphere of Foreign Relations—Prevention of Acts Contrary to Interests of Foreign States—Mandated Territory—Restriction of Immigration—Palestine—Co-operation by United States in British Blockade—Refusal to Allow Vessel To Be Used for Transport of Illegal Immigrants.

DERECKTOR *v.* UNITED STATES.

United States, Court of Claims. July 13, 1954.

THE FACTS.—This was an action for damages arising out of the refusal of the United States Maritime Commission to give the plaintiff the documents needed to operate or resell a certain vessel, the *Colonel Frederick C. Johnson*, which had been sold to him by the Commission on the representation that the purchaser would be allowed to transfer the ship to foreign ownership or registry. In October 1947, the plaintiff applied for permission to transfer the ship to Panamanian registry and flag. Permission was withheld by the Maritime Commission at the request of the Department of State, which believed that the vessel would be used for the transport of illegal immigrants to Palestine. The Department of State continued to refuse approval of the transfer until May 1948, when it stated that it had no objection to the transfer of the ship to the Panamanian flag, provided that it was chartered to Dutch interests, with whom negotiations had been carried on by the plaintiff, and that the charter would stipulate that the ship would not call at Black Sea ports or transport illegal immigrants therefrom. It did not prove practicable to effect the charter of the vessel, and it was ultimately sold to an agency of the State of Israel and employed in the transport of immigrants.

Held (two Judges dissenting): that the petition must be dismissed. The action of the Department of State was a sovereign act, amounting to an embargo, effected in order to prevent the resources of the United States from being used as a nuisance to a friendly State acting as Mandatory Power for Palestine. The United States could not be made to respond in damages for such an act.

The Court said: " On July 24, 1922, the Council of the League of Nations conferred upon Great Britain a mandate for Palestine, to be a homeland for the Jews. In a convention of December 3, 1924, between the United States and Great Britain, the United States consented to the administration of Palestine by Great Britain, ' pursuant to the Mandate '. After World War II there was an increasing movement of European Jews to Palestine. The British by decree imposed an immigration quota of 1,500 per month. Their decree was extensively evaded. Those who got in without quota clearance were designated by the British as ' illegal ' immigrants, and will be so referred to in this opinion.

" Evidence gathered by the British Foreign Office in 1946 showed that support, in money and ships, for the illegal traffic was coming from sources within the United States. In December 1946, representations to that effect were made by that office to the United States. From that time our Department of State became concerned with Jewish migration to Palestine . . . . .

" On June 2, 1947, an Assistant to the Legal Adviser of the State Department conferred with the Assistant Attorney General in charge of the Criminal Division of the Department of Justice concerning ' representations of the British Government regarding illegal acts in the United States which aid terroristic activities in Palestine.' The State Department representative exhibited the FBI reports with respect to military training activities in New York and ships leaving the United States to carry immigrants to Palestine. There was discussion of the case of the *Alabama* during our Civil War, in which an arbitration tribunal awarded fifteen million dollars to the United States because Great Britain failed to prevent the departure from its ports of ships engaged in preying upon the commerce of the United States.

" On June 5, 1947, President Truman issued a statement urging all United States citizens to refrain from engaging in or facilitating any activities which tended to further inflame the passions of the inhabitants of Palestine, to undermine law and order in Palestine, or to promote violence in that country. This statement was in accord with a resolution adopted on May 15, 1947, in the General Assembly of the United Nations.[1] . . . .

" On August 7, 1947, the Secretary of State wrote the British Minister of Foreign Affairs to the effect that the United States would endeavor to see that no ships owned by the American Government were thereafter sold to persons whose activities gave reason for belief that the ships would be used for the purpose of transporting

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[[1] *Official Records of the General Assembly, First Special Session*, vol. 1 (1947), pp. 174–176.]

illegal immigrants to Palestine. Thereafter there were numerous representations made to State Department officials concerning the relation of Americans to illegal immigration to Palestine. The British Embassy in Washington pointed out the connection of Captain Ash[1] with the *President Warfield*, and with the *Colonel Johnson*, the ship with which this litigation is concerned. On October 18, 1947, the British Ambassador wrote to the Secretary of State asking that all possible steps be taken to insure that the Colonel Johnson not be allowed to sail until her *bona fides* had been thoroughly established . . . . .

" The Maritime Commission's refusal to approve of the transfer of the ship to Panamanian ownership and registry damaged the plaintiff financially, in the maintenance costs to which he was subjected during the period of the delay, and in the fall of the market price of ships during that period. Our problem is to determine whether the Maritime Commission's refusal was justified. The refusal was at the behest of the State Department. The State Department was moved, in the beginning at least, by representations made to it by the British Government.

" The British Government had undertaken the mandate for Palestine for the League of Nations in 1922. We had formally recognized the mandate in 1924. It was a burdensome and thankless task for the British. We are in no position to judge whether they performed it wisely or unwisely. After World War II the British task became almost impossibily difficult. The natural urge of Jews to leave Europe, the site of their incredible persecution by the Nazis, and the sympathetic support of their more fortunate brethren in America and elsewhere, combined to set in motion an immigration into Palestine which, if left unrestricted could only have resulted in hardship and disorder. Britain set a quota of the number of immigrants that she thought could be assimilated. The evasion of that quota became a great industry, financed by many rich Americans.

" Britain complained to the United States, through proper channels, that our citizens were fitting out ships in our shipyards and recruiting crews in our ports, to evade and nullify Britain's policy with regard to her Palestine mandate. The law, as is not unusual in international affairs, was not clear, but the moral obligation not to permit our resources to be used as a nuisance to a friendly power was clear.

" In the case of the *Alabama*, we had complained bitterly of Britain's conduct in allowing her facilities to be used to fit out ships to prey upon our commerce. The arbitrators concluded that our complaint was justified and awarded us damages of more than $15,000,000. That there was a real danger that the *Colonel Johnson* would, if it got outside the control of the United States, be used to run the British blockade, was a natural deduction from the evidence at hand. Captain Ash's past conduct and the history of the ships of his Weston Trading Company, pointed strongly in that direction.

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[1] [Captain Ash had acted for the plaintiff.]

" If it had been possible for the plaintiff to operate his ship under American registry and flag, our Government could have controlled its voyages, and the bottling up of the ship at Norfolk would not have been necessary. But the plaintiff, quite naturally, was not willing to spend on the ship what it would have cost to put it in class as an American ship, nor to pay the costs of operating it as an American ship. When once it had passed to Panamanian ownership and registry it would have been beyond the control of our Government, no matter what it did. That it ultimately did engage in frustrating our own policy against transporting immigrants from Communist Rumania to Israel shows how helpless our Government was once the transfer had been accomplished.

" The plaintiff points to the language of the contract of sale. It said that the Maritime Commission would consent to the transfer of the ship to foreign ownership, registry and flag. The Commission did not so consent, except after a long delay, and the plaintiff was damaged by its failure to do so. The Government defends its apparent breach of contract on the ground that the State Department, responsible for the conduct of our foreign relations, had probable cause to believe that if transfer was permitted, our foreign relations might be seriously prejudiced. As we have indicated above, we think the State Department did have probable cause to believe as it did. And, so believing, we think it had the duty to object to the transfer and that the Maritime Commission had the duty to withhold its consent.

" The State Department's action was a sovereign act. It was, in effect, an embargo. It seems to have applied to only one ship. But we have no doubt that the same policy would have been applied to any other ship or owner if there had been probable cause to believe that it presented the same problem. There is no suggestion in the record that the Government's representatives bore any malice or prejudice toward the plaintiff. If there is any field in which the hands of the Government should not be tied, in which it should feel free to meet and solve problems without fear of being charged with breach of contract, that field must be peculiarly the field of international relations."

[Reports: 129 Ct. Cl. 103, 128 F.Supp. 136.]

States—Acts of Sovereignty—Conduct of Foreign Relations—Alleged Negligence in Obtaining from Foreign State Inadequate Compensation for Use of Private Property—Whether Home State Liable to its Own Subjects—The Law of France.

See *In re Taurin and Mérienne*, decided by the French Conseil d'État on October 29, 1954, in which it was *held* that French courts must decline to entertain claims of French nationals which arose out of alleged negligence of the French Government in conducting negotiations with foreign Governments. The Court said that the owners of a ship which was lying in a French port and which was taken by the British authorities in exercise of the right of angary during the Second World War, and for the use of which the British Government paid an agreed sum of money to the French Government after the war, were not entitled to sue the French Government for damages for alleged negligence in failing to obtain on their behalf sufficient compensation from the British Government. [Report: *Dalloz et Sirey*, 1955, *Jurisprudence*, p. 361.]

Conclusiveness of Statements of Executive—Foreign Office Certificate—Status of International Organization—Action Relating to Land Owned by International Organization.

See p. 279 (*Procureur Général of the Court of Cassation* v. *Syndicate of Co-Owners of the Alfred Dehodencq Property Company*).

IV.—Recognition of Acts of Foreign States and Governments

[*See also below*, D, Recognition of States, Governments, Belligerency; *and* PART IV, JURISDICTION: I, TERRITORIAL.]

Recognition of Acts of Foreign Governments—Action for Inducing Breach of Contract with Foreign Government—Litigation between Private Persons—Refusal to Adjudicate on Validity of Acts Done by Foreign Government within Its Own Territory.

FRAZIER *ET AL.* *v.* FOREIGN BONDHOLDERS PROTECTIVE COUNCIL, INC., *ET AL.*

United States, Supreme Court of New York, Appellate Division, First Department. November 24, 1953.

Supreme Court of New York, Special Term, New York County. June 21, 1954.

THE FACTS.—This action involved the same bonds and scrip certificates as were in issue in *Frazier* v. *Hanover Bank* (see *International Law Reports*, 1953, p. 173). When the plaintiff in that case failed to secure distribution of the scrip certificates to himself and other former owners of the bonds, they brought this action seeking damages for the alleged tortious conduct of the defendant in inducing the Republic of Peru to break its contract with them. The defendant Protective Council, a quasi-public agency devoted to the protection of American holders of bonds of foreign Governments, was alleged to have induced the breach of contract by requiring Peru to issue the newly authorized scrip certificates to the current holders of the new bonds, instead of to those who, like the plaintiffs, had originally received such bonds in exchange for the original bonds upon the term of the 1947 offer. The defendants interposed defences that the plaintiffs' claim would require an adjudication whether Peru had reached a valid and existing contract with the plaintiffs and whether that State had violated that contract, and that such an adjudication would necessitate passing on the validity of an act of a foreign sovereign Government acting within its acknowledged powers. The plaintiffs moved to strike the defences, and the motion was granted by Special Term. On appeal,

Held (by the Appellate Division of the Supreme Court of New York): that the order appealed from must be reversed. The alleged repudiation by Peruvian legislation of the contract implicit in the bonds was the act of a foreign Government within its own territory. A court of the United States would not sit in judgment on such acts, even though the issue was raised in litigation between private citizens.

The Court said: " But the immunity of a foreign sovereign, in all its implications, is not restricted to warding off only those assaults aimed directly at that sovereign as a party proper. Whenever the propriety of the acts of the foreign sovereign are placed in issue our courts, in deference to the historic principle that the king may not be sued, grant to the foreign sovereign as a matter of favor some measure of the immunity which the latter enjoys as a matter of right when party to an action. One sovereign gives due recognition of the stature of another sovereign, and in turn expects similar consideration, *The Schooner Exchange* v. *McFaddon*, 7 Cranch 116, 3 L.Ed. 287. It is a doctrine born of expediency, nourished in the council halls of nations as well as the courts of justice. Its dominant motif is political. It has gained stature in the world of international diplomacy and politics, where an ' incident ' involving the dignity of nations is measured by its explosive potential as well as its legal implications. ' . . . it rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign state to be re-examined and perhaps condemned by the courts of another would very certainly " imperil the amicable relations between governments and vex the peace of nations." ' *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302, 38 S.Ct. 309, 311, 62 L.Ed. 726.

" Because of these practical considerations it is the general rule that when a foreign government is recognized by our State Department, our courts will not sit in judgment on the validity of acts done by that government within its own territory. This general rule holds true whether the foreign government is sued directly or through an

agent, or whether its actions are questioned collaterally in litigation between private citizens. *Underhill* v. *Hernandez*, 168 U.S. 250, 252, 18 S.Ct. 83, 42 L.Ed. 456; *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 38 S.Ct. 309, 62 L.Ed. 726; *Ricaud* v. *American Metal Co.*, 246 U.S. 304, 38 S.Ct. 312, 62 L.Ed. 733; *Hewitt* v. *Speyer*, 250 F. 367; *Bernstein* v. *Van Heyghen Frères Société Anonyme*, 2 Cir., 163 F.2d 246[1]; *Lamont* v. *Travelers Insurance Co.*, 281 N.Y. 362, 24 N.E.2d 81[2]; *Telkes* v. *Hungarian National Museum*, 265 App.Div. 192, 38 N.Y.S.2d 419.[3]

" The plaintiffs' characterization of the defenses as an attempt to immunize a private citizen for wrongdoing to another private citizen must be considered in juxtaposition to the assertion in their brief that such wrongdoing resulted in ' an outright and unabashed repudiation ' by Peru. Our courts are traditionally loath to resolve such issues. In *Oetjen* v. *Central Leather Co.*, *supra*, and *Ricaud* v. *American Metal Co.*, *supra*, the Supreme Court affirmed the dismissal of suits between private citizens because they involved personal property confiscated in Mexico by armed forces of General Carranza, whose government later became the de jure government of Mexico. And in *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826, it was alleged that Costa Rican soldiers and officials instigated by the defendant seized property belonging to the plaintiff. In affirming the judgment dismissing the complaint, the court, by Mr. Justice Holmes, said, 213 U.S. at pages 358–359, 29 S.Ct. at page 513, 53 L .Ed. 286:

> ' The fundamental reason why persuading a sovereign power to do this or that cannot be a tort is . . . that it is a contradiction in terms to say that, within its jurisdiction, it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. . . . A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law.'

" To the same effect and most apt is the following self-explanatory sentence from *Hewitt* v. *Speyer*, *supra*, 250 F. at page 371:

> ' There can be no escape from the proposition that either the government of Ecuador wrongly diverted from the bondholders the moneys paid to Speyer & Co., in which event the courts of the United States must disclaim any jurisdiction to adjudicate upon the matter, or such diversion of the revenues was lawful, in which event the complainant is without a cause of action.'

" Plaintiffs seek to distinguish the *American Banana Co.* case by asserting that the alleged persuasion in this case took place within the United States. Again, the plaintiffs are thinking within the dimensions of their local tort action, rather than of the preponderating international considerations. The decisive act in the alleged repudiation of the contract was the enactment of the law by the Congress of Peru.

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[1] [See *Annual Digest*, 1947, Case No. 5.]

[2] [*Ibid.*, 1938–1940, Case No. 73.]

[3] [*Ibid.*, 1941–1942, Case No. 169.]

"We need not reach the question as to whether in respect of the Peruvian government's action the alleged ' repudiation of its obligations by decrees, is contrary to our public policy and shocking to our sense of justice and equity.' *Vladikavkazsky R. Co.* v. *New York Trust Co.*, 263 N.Y. 369, at page 378, 189 N.E. 456, at page 460, 91 A.L.R. 1426.[1] The only question before us concerns the right of defendants to assert these defenses at the trial. Certainly it cannot be said at this state of the litigation that Peru's action is so shocking or contrary to our notions of justice as to warrant dismissal of the defenses. It did not reject an obligation in toto, but elected to pay one class of persons instead of another. For aught that appears in the record the alleged breach and the alleged inducement were motiveless and profitless; and an action might just as plausibly have been brought by the current bondholders had Peru given the scrip certificates to the class represented by plaintiffs. At the least, the defendants should be permitted to adduce evidence in support of their defenses bearing on whether determination of the merits of the plaintiffs' claim will entail passing on the validity of the action of a sovereign acting within the scope of its sovereign competency. Perhaps our courts should be even more sensitive to the involvements of a sovereign's action when the sovereign is not a party to the action, and the adjudication as it affects its prestige and dignity partakes of the nature of an ex parte proceeding." [Reports: 283 App. Div. 44, 125 N.Y.S. 2d 900.]

Leave to appeal was applied for and refused. [Reports: 283 App. Div. 655, 127 N.Y.S. 2d 815]. Thereafter plaintiffs added other counts to the complaint which charged defendants with dereliction in the performance of services on behalf of plaintiffs. The defendants moved for summary judgment.

Held (by the Special Term of the Supreme Court of New York): that the motion must be granted. The action of Peru in determining that the obligation created by its 1947 offer ran to one of two competing classes of bondholders was not contrary to the public policy of New York.

" The Court said: ". . . . Defendants have established by documents that, as the Appellate Division required, ' the merits of the plaintiffs' claim will entail passing on the validity of the action of a sovereign acting within the scope of its sovereign competency ' 283 App.Div. at page 49, 125 N.Y.S.2d at page 904, for the challenged act of Peru in issuing scrip to current bondholders was an act of legislation, a copy of the pertinent law having been submitted and unchallenged. The only possible residual issue of fact is ' whether in respect of the Peruvian government's action the alleged " repudiation of its obligations by decrees, is contrary to our public policy and shocking to our sense of justice and equity." ' *Vladikavkazsky R. Co.* v. *New York Trust Co.*, 263 N.Y. 369, at page 378, 189 N.E. 456, at page 460, 91 A.L.R. 1426. 283 App.Div. at page 49, 125 N.Y.S.2d at page 904; I think not.

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[1] See *Annual Digest*, 1933–1934, Case No. 27.]

" Of course, if the challenged act of Peru reaches no property in New York, but only in Peru, serious doubts might arise as to the competency of our courts even to consider the compatibility of that act with our public policy. *Dougherty* v. *Equitable Life Assur. Soc. of United States*, 266 N.Y. 71, 193 N.E. 897;[1] *Salimoff & Co.* v. *Standard Oil Co.*, 262 N.Y. 220, 186 N.E. 679, 89 A.L.R. 345;[2] *Oetjen* v. *Central Leather Co.*, *supra*; *Banque de France* v. *Equitable Trust Co.*, D.C., 33 F.2d 202;[3] *Luther* v. *Sagor* [1921] 1 K.B. 456.[4] Moreover, before a sovereign may be charged with the offense of breaching its contract, ' the obligation alleged to have been impaired [must] be clearly and unequivocally expressed ', *Keefe* v. *Clark*, 322 U.S. 393, 396, 397, 64 S.Ct. 1072, 88 L.Ed. 1346, and here, at the least, plaintiffs' construction of the contractual obligation incurred by the Peruvian offer of 1947 is considerably less than ' clearly and unquivocally expressed '. Indeed, as the United States Constitution bars only the states from impairing the obligation of contract, Art. 1, Sec. 10, Cl. 1, and not the federal government, *State of New York* v. *United States*, 257 U.S. 591, 42 S.Ct. 239, 66 L.Ed. 385; *Mitchell* v. *Clark*, 110 U.S. 633, 4 S.Ct. 170, 28 L.Ed. 279, except to the extent that due process forbids such impairment by the federal government, it is not clear how far any impairment of the obligation of a contract can be deemed ' shocking ' especially where, as here, it involves, in that view most favorable to plaintiff's position, preferential treatment of a class of creditors which, in appropriate circumstances, is allowable as a matter of due process. *United States* v. *Pink*, 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed. 796;[5] *The Disconto Gesellschaft* v. *Umbreit*, 208 U.S. 570, 28 S.Ct. 337, 52 L.Ed. 625.

" At bottom, the action of Peru is a determination that the obligation created by its 1947 offer runs to one of two competing classes of bondholders. Assuming a reasonable difference of opinion on this score, such power Peru clearly must have and its exercise here does not disturb even the most sensitive conscience or morality. The Appellate Division suggested that the claims of current bondholders to the scrip were, at the least, plausible, 283 App.Div., at page 49, 125 N.Y.S.2d 900; to make a determination as between competing plausible claims cannot be characterized as ' shocking '.

[[1] See *Annual Digest*, 1933–1934, Case No. 28.]
[[2] *Ibid.*, Case No. 8.]
[[3] *Ibid.*, 1929–1930, Case No. 22.]
[[4] *Ibid.*, 1919–1922, Case No. 26.]
[[5] *Ibid.*, 1941–1942, Case No. 13.]

New York Guaranty & Indemnity Company v. *Board of Liquidation*, 105 U.S. 622, 26 L.Ed. 1106; see also *Bier* v. *McGehee*, 148 U.S. 137, 13 S.Ct. 580, 37 L.Ed. 397; Peru could well have considered that since current bondholders were clearly, and concededly, entitled to the other advantages flowing from the 1953 offer, it would be unwise and inexpedient to split the bestowal of the advantages of that offer so that the former bondholders such as plaintiffs received that portion of the offer which pertained to the accrued interest while the current bondholders received the balance of the improvements contained in the 1953 offer; and Peru may also have determined that current bondholders may have construed the 1947 offer as does Peru and therefore bargained and paid for all subsequent improvements in the servicing of the new bonds. That the action of Peru is something less than shockingly unconscionable warranting judicial intervention and proscription is evidenced further by the fact that no question is raised by Peru or any other party here as to Peru's obligation to honor the relied-upon provision in the 1947 offer although that provision was not incorporated into the new bonds.

" As to that phase of this action which was added after the decision of the Appellate Division sustaining the validity of the affirmative defenses, the motion for summary judgment must likewise be granted. Here, too, the action necessarily places under judicial review and scrutiny the exercise of its sovereignty by Peru, a matter said by the Appellate Division not to be properly within the jurisdiction of our courts. In addition, this phase of the suit is not founded on any sound base of tort liability . . . ."

[Report: 133 N.Y.S. 2d 606.]

NOTE.—The decision of the Appellate Division is noted in *Miami Law Quarterly*, 8 (1954), p. 632.

Recognition of Acts of Foreign States—Foreign Confiscatory Legislation—Exterritorial Effect of—Property in Territory of Foreign State at Time of Confiscation—Subsequent Removal to Country of Forum—Claim by Former Owner—Whether Courts of Forum Entitled to Grant Injunction when Foreign State Not Party to Proceedings—The Law of France.

DE KELLER *v.* MAISON DE LA PENSÉE FRANÇAISE.

France, Tribunal Civil de la Seine. July 12, 1954.

THE FACTS.—One S., a Russian citizen, was until 1918 the owner of a picture gallery in Moscow. A decree of the then Russian Government published on November 5, 1918, laid down that this picture gallery was henceforth to be " the State property of the Federal Russian Soviet Socialist Republic ". S. subsequently left Russia, and died in Paris in 1936. In about 1954 the defendants held an exhibition at which they exhibited a number of pictures formerly forming part of the art gallery of the late S. In the defendants' catalogue the pictures were described as having been lent by the museums of Moscow and Leningrad. The plaintiffs, the daughters and personal representatives of the late S., thereupon asked for an order for the sequestration of the pictures. This order was intended to safeguard the pictures in France, for the time being, so as to enable the plaintiffs subsequently to institute proceedings for the determination of the question of ownership. The defendants did not set up any title of their own as against the plaintiffs' claim.

Held: that no order for the sequestration of the pictures would be made; the questions to be determined in these proceedings not only raised the issue of title, which could not be decided in the absence of the other party (the Soviet Union), but also the issue as to whether the Soviet Union was subject to the jurisdiction of the French courts.

The Court said: " The defendants are not entitled to defend this action on behalf of the individual who has entrusted to them one of these pictures,[1] nor on behalf of the foreign State which entrusted the other pictures to them. . . . The true defendants in this case would be the said individual and the Union of Soviet Socialist Republics, or a juridical person under Russian public law, if the museums of Leningrad and Moscow enjoy legal status in accordance with the law of their country. While the remedy which is now being applied for in their absence would not be binding on them, either on the merits or so far as concerns the sequestration as such, it would nevertheless have the effect of limiting their rights of enjoyment and disposition of property of which they are at present the undisputed possessors, and it would, without their being able to state their case, acknowledge the serious nature of the claim which the plaintiffs have not yet made in formal legal proceedings. Sequestration, if it were ordered, would thus affect the interests of third parties who are not parties to the [present] proceedings and of whom at least one might be able to rely on his status and the nature of the action taken by him so as to negative not only our right to exercise jurisdiction, but also—quite generally—the right of all French courts to exercise jurisdiction. In order to allow the plaintiffs' claim it would be necessary to determine whether the fact that pictures are being openly exhibited in France which were acquired by a foreign State more than thirty years ago from one of its nationals and on its own territory, in accordance with its own law, affects our own legal order to such a serious extent that this state of affairs ought to be put an end to speedily. All these difficulties would require us to answer important questions which

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[[1] One of the pictures the ownership of which was in issue had been lent to the defendants by a private owner. The judgment does not state how the latter had acquired his title.]

this Court cannot do without prejudging the admissibility of the main action and the question as to whether the French courts are entitled to exercise jurisdiction over it. For these reasons we decline to make the order of sequestration for which the plaintiffs ask."

[Report : *Revue critique de droit international privé*, 44 (1955), p. 503.]

Recognition of Acts of Foreign Governments—Recognition of Foreign Law—Whether Consistent with National Sovereignty—Enforcement in Holland of Belgian Decree Providing for Restitution to the Belgian State of Money Paid in Pursuance of Illegal Acts of Occupying Power in Belgium.

KINGDOM OF BELGIUM *v.* MRS. DE V.

Holland, District Court of The Hague. April 22, 1954.

THE FACTS.—The present case is similar to the cases of *Kingdom of Belgium* v. *Albrecht and Willem Wannijn* (see *International Law Reports*, 1953, p. 28) and *Kingdom of Belgium* v. *E.M.J.C.H.* (*ibid.*, p. 26), except for the nationality of the defendant. In the present case the defendant was of Netherlands nationality. The other relevant facts are as stated in the reports of the two decisions mentioned above.

Held: that the defendant must repay to the Belgian State the amount received under the Decree of the German Military Commander in Belgium of September 6, 1940.

The Court said: "The defendant is of the opinion that the Decree-Law of June 2, 1944, issued by the Belgian Government in London cannot apply because she is a Dutch national and the money was paid to her in the Netherlands. That is why, according to her, Belgian law cannot be applicable. By Netherlands private international law, however, neither the nationality of the defendant nor the place of payment is relevant for the question what law must be applied in an action for repayment of money received. The law to be applied is that which governs the legal relations between the parties. It is common ground between the parties that payment was made by virtue of an Ordinance issued in Belgium by the Military Commander of the Occupying Power, and that it was made because the Borms Commission had granted a widow's pension to the defendant in connection with the Belgian post previously held by her husband. This demonstrates that the legal relation between the parties is governed by Belgian law. The defendant argues, however, that the Belgian Decree-Law has no extraterritorial effect because that law was of a public nature and that applying it would mean that Belgium in fact exercises sovereign powers on Netherlands territory. It is true that no foreign laws should be applied which are of such public nature that applying them would mean an infringement of Netherlands sovereign powers. The present decree-law however, purports to nullify the consequences of interference by the occupying power. It forces those who, as a result of such interference, had received any money, to refund such money. The creation of such an obligation to refund is not of such public nature that its enforcement in the Netherlands would entail an infringement of Netherlands sovereign powers. In the present case payment must be made to the Belgian State, but not to that State as a public body (as in case of taxation), but to it exclusively as a body corporate which had to make the payments on the instructions and by order of the Occupying Power. This appears from the phrases ' doit restitution ' and ' l'obligation de restituer ', from which it may be deduced that if the Ordinance of the Occupying Power had ruled that the payments were to be made by another body, the Decree-Law would provide for the refund to that other body, as it obviously intends to re-establish the original situation. The Decree-Law may therefore be applied in the Netherlands except where such application, generally or in a specific case, will be contrary to public order. In this respect it is of decisive importance that the purpose of the Decree-Law is to nullify the consequences of interference by the Occupying Power and to bring all the parties concerned back to the position in which they had been. Such legislation aiming at nullifying the consequences of interference by the Occupying Power is certainly not contrary to Netherlands public order. It is also to be found in Netherlands law and it is in accordance with the Netherlands sense of justice. From the Inter-Allied Declaration against Acts of Dispossession committed in Territories under Enemy Occupation or Control, of which the Netherlands Government was a Signatory, it appears that also that Government was of the opinion that some such legal restitution ought to be provided for in other countries as well. This also shows that to nullify the consequences of interference by the Occupying Power in Belgium is not at all contrary to Netherlands public order. It appears unquestionably from the form and wording of the Ordinance issued by the Military Commander that it was interference on the part of the German Occupying Power. Since the Decree-Law by which the consequences of this interference were nullified is not contrary to Netherlands public order, this Decree-Law must be applied by the Netherlands courts as between the Belgian State and the defendant, who is a Netherlands national, What is involved here is nullification and removal of interference by the mutual enemy of Belgium and the Netherlands. Also, where a person of Netherlands nationality is concerned, such nullification is not contrary to public order. On the contrary, it is in accordance with the Netherlands sense of justice.

[Report: *N.J.*, 1954, No. 767.]

NOTE.—The Court's statement of reasons is similar to that of the Court of Appeal of 's-Hertogenbosch in *Kingdom of Belgium* v. *Albrecht and Willem Wannijn* (*supra*, p. 23). However, it differs widely from that of the Court of Appeal of The Hague in *Kingdom of Belgium* v. *E.M.J.C.H.* (*ibid.*). Appeal from the judgment reported above was made to the Court of Appeal of The Hague. That decision will be published in the 1956 volume of the *International Law Reports*.

Recognition of Acts of Foreign States and Governments—Public Law of Foreign State—Public Law Aimed at Protecting Private Interests—Legislation to Restore Property Rights of Persons Dispossessed during Belligerent Occupation—Recognition in Third State—Belligerent Occupation—Government-in-Exile—Legislation of—Validity of.

AMMON *v.* ROYAL DUTCH COMPANY.

Switzerland, Federal Tribunal. February 2, 1954.

THE FACTS.—In 1946 the appellant acquired on the Zürich Stock Exchange four bearer shares of the Royal Dutch Company. The shares were provided with affidavit L1 certifying that they had been in Switzerland since June 1944, but not with affidavits A and L2 certifying that they had been owned by Swiss nationals or located in Switzerland since September 1939. In conformity with Netherlands law the respondent Company did not pay interest or dividends on such shares until their ownership was decided according to the procedures laid down in the Decree for the Restoration of Legal Rights of September 17, 1944 (RRD); ownership was considered to lie in persons who had acquired it prior to May 10, 1940, or had subsequently acquired it in good faith. The appellant sought to obtain compensation for outstanding dividends and for the " unlawful devaluation " of the shares by attaching assets of the respondent Company deposited with the Crédit Suisse in Zürich. In support of his claim it was contended that his rights in relation to the shares were governed by Swiss law which did not provide for the withholding of dividends, or, alternatively, that, even if Netherlands law was applicable, the provisions in question could not be enforced in Switzerland since they were provisions of public law and were contrary to Swiss public policy. The Court of Appeal of Zürich dismissed the claim. This was an appeal from that decision.

Held: that the appeal must be dismissed. Netherlands law was applicable to the rights of the appellant. The relevant provisions of Netherlands law, though public law, were aimed at the protection of private interests, and were therefore not automatically unenforceable in Switzerland. They were not contrary to Swiss public policy.

The Court said, with regard to the second and third points: " The Federal Tribunal has repeatedly declared that the public law of another State is in principle not applicable or enforceable in Switzerland (A.T.F., 74 II 229, 50, II, 58, 42 II 183). The scope of this general principle nevertheless requires clarification in view of the fundamental unity of the legal order of a State, and the reason for its existence must be inquired into.

" It is generally recognized in judicial decisions and in the writings of publicists that foreign criminal, procedural, constitutional and administrative law, and in particular tax law, is not applicable in municipal courts, at any rate as a direct source of law. On the other hand, there are cases in which it may be indirectly applied or observed. Only the definition and delimitation of these cases is at issue. . . . As far as Swiss law is concerned, Marti (*Der Vorbehalt des eigenen Rechtes im IPR der Schweiz*), basing himself on Neumeyer and Melchior, defends the view that foreign public law can and should be taken into consideration by Swiss courts if it supports the purposes of the governing foreign private law.

" The question thus turns on the *primary purpose* of the foreign rule which intervenes as a special provision in a private law relationship. As long as such an intervention in private law or in legal relations governed by private law by means of public law is aimed solely or primarily at the protection of *private* interests (as opposed to the needs of the State itself), there is no reason why Swiss courts should exclude such foreign public law merely on the ground of its legal nature. There remains the question whether the foreign law, admissible in itself, must be excluded on the ground of public policy; this question will be examined later.

" Swiss judicial decisions and writings concord with the foregoing view when they refuse to give effect to confiscatory laws, whether they be wartime measures or non-belligerent in nature, as in the case of prohibition of payments under exchange control regulations . . .

" In the present case it must be assumed that the RRD is aimed at protecting private property, inasmuch as it seeks to restore the property rights of all the inhabitants of the Netherlands who were robbed of assets, and in particular of securities, during the enemy occupation . . . It is not a measure for harming the enemy or an instrument of economic warfare, nor is it an expropriation order or similar measure. . . . It is not impossible that in a given case this Decree may operate to the detriment of an innocent holder of a negotiable instrument, but that is—and this is the crux of the matter—not the purpose, nor even a necessary consequence, of it. Even if the RRD were regarded as a public law enactment, it does not belong to those rules of foreign public law which must not be applied by Swiss courts because of their legal nature. However, with reference to the ' private interests ' theory, it must be characterized as a private law enactment. . . .

" The objection that Decree E 100, which forms the basis of the RRD, was issued in London and was only subsequently brought into force in the Netherlands with retroactive effect, is not valid. Enactments by the Head of State of the Netherlands who was resident in the United Kingdom during the war are constitutionally laws of the Netherlands and applied *ab initio* to the territory occupied by the German army even though they could not be effectively implemented there until the liberation of that territory in the autumn of 1944. . . .

" It is further contended that Swiss courts should refuse to apply the RRD with reference to Swiss public policy on the ground that it is irreconcilable with the fundamental principles of Swiss law.

" (a) It must first of all be stressed, confirming the findings of the lower Court, that there can be no question of ruling once and for all that the RRD as such is absolutely irreconcilable with Swiss public order or, conversely, that it is reconcilable therewith in every given case. On the contrary, the sole question to be examined is how this RRD operates in the present case of the appellant. This restriction of the examination to the individual case and the consequent restriction of the scope of the judgment is in accordance with established precedent.

" (b) In the appellant's opinion, the irreconcilability of the result of applying the RRD with the Swiss conception of law resides in the fact that he has been deprived of the shares at issue practically without indemnification, and this, moreover, to the advantage of the Dutch State.

" It must be conceded to the appellant that, in consequence of the application of the RRD, he is in practice in a similar position to a person who has been dispossessed or to a *mala fide* purchaser who is deprived of the object of his purchase and has no recourse against anyone. *De facto*, if not *de jure*, the appellant's shares are unremunerative and have probably depreciated to such an extent as to be unsaleable, at any rate for so long as the appellant does not succeed, through the procedure laid down in the RRD, in effecting the recognition of his rights and the removal of the shares at issue from the Dutch blocked list. It is also evident that the appellant will be left without any compensation and that the purchase price paid will not be refunded to him. This would certainly be irreconcilable with the Swiss conception of law if it represented all the facts of the case. But in several respects the position with regard to these facts is otherwise.

" (1) This position is not the consequence of a measure by a foreign State dictated by self-interest or hatred, as is the case with military measures or measures of economic warfare, or racial, religious or political persecution. Rather is the RRD aimed, as already stated, at looking after private interests, at the protection of persons and companies who, in the course of the war and during the occupation of Holland, were robbed and plundered by the Occupying Power and who have a legal and moral claim to restitution of the stolen valuables or to compensation in some other form. It is therefore a question of the rights of the private individual or of private undertakings, and not of the interest of the State, as the appellant continually maintains.

" (2) It is, of course, open to the appellant to seek relief before the Dutch courts, as already explained by the Court below (Judgment, p. 12). This would involve normal proceedings before an independent tribunal under the chairmanship of a senior Judge, thus guaranteeing a conscientious and impartial dispensation of justice in regard to the decisions of the Securities Registration Division. In a case of intervention in a legal relationship such as the present one, it is of decisive importance whether one is powerless and without legal remedy in the face of such intervention or whether one can turn to an independent tribunal. If the appellant does not wish to avail himself of this possibility, although the shares at issue were registered partly before and partly after acquisition by him, this is due to the fact that, as he himself states, with his affidavit L1 certifying the presence of his shares in Switzerland only since June 1944 he has ' relatively little evidence ' (Appeal, p. 9). This is unimportant, however, as regards the question of principle whether the necessary conditions are present for the application of Swiss public policy.

" (3) To this must be added the fact, as established by the Court below, that the securities at issue are indeed stolen property, having been removed from Holland in 1941 by the Germans (Judgment of the lower Court, pp. 13 ff.; Cantonal Records, 76/2, 5–15).

" (4) Finally, the appellant cannot be regarded as a *bona fide* acquirer of the shares at issue. At the very least, he took the risk when purchasing them that they might have been stolen. There is, it is true, no evidence that he knew the securities he acquired in the summer of 1946 to be in fact stolen property, and, contrary to what is stated in the appeal (pp. 8–10), such knowledge has not been imputed to him by the lower Court; nor has it been maintained that the RRD made his purchase one of bad faith *ex post facto*. On the other hand, as the appellant himself acknowledges, the legal position of foreign shares on Swiss stock exchanges was not merely discussed throughout the war. When the appellant bought the shares at issue in the summer of 1946 they were provided only with an affidavit L1, *i.e.*, certifying that they had been in Switzerland since June 1944. They were accompanied neither by affidavit A nor by affidavit L2, which would have confirmed pre-war Swiss ownership or location in Switzerland since the period preceding the outbreak of the war. The appellant knew, or must have known had he been normally observant, why there were affidavits; for he is not a man inexperienced in business. In the summer of 1946 he could not have been innocently unaware of the risk involved in such a purchase of shares. At that time, more than a year after the war had ended, it was widely known in Switzerland that quantities of pictures, valuables and negotiable instruments had been removed from Holland as stolen property and put on the market in other countries, particularly in Switzerland. Six months previously, in December 1945, the Federal Council had issued the Stolen Property Decree, which attracted considerable attention at the time, its motivation and content being discussed and criticized in the press. The acquirer of such foreign securities was therefore also threatened from Swiss sources, and not merely by Dutch Government measures. Moreover, the price at which these securities were quoted, which has been shown by the lower Court to have been relatively low, should also have warned the appellant to observe caution in making his acquisition.

" Anyone who, like the appellant, nevertheless purchases such risky securities in such circumstances must resign himself to being treated as if he had not acted in good faith; for good faith presupposes innocent unawareness of the risk involved. Such unawareness cannot, however, be conceded to the appellant under the given circumstances. . . .

" (7) Finally, it must be observed that the Swiss courts cannot refuse to consider the Dutch stolen property legislation in the present case, where there is in fact a question of stolen property and the appellant cannot be regarded as a *bona fide* acquirer, by relying on Swiss public policy, for the further reason that through her own stolen property legislation Switzerland has herself lent a hand and helped to reinstate the victims of theft in their rights. In the face of facts such as those in the present case, therefore, she cannot logically characterize Dutch measures such as blocked lists and payment prohibitions, which serve the same ends, as an intolerable violation of the Swiss conception of law.

" Also inadmissible on this ground is the appellant's objection (Appeal, p. 11) that conflicts of claims (Swiss and Dutch laws concerning stolen property) should be excluded.

" On the grounds set forth above, the refusal of payment of dividends by the respondents *vis-à-vis* the appellant has been shown not to be unlawful. The claim for payment of dividends therefore fails, as does also the claim for compensation. . . ."

[Report: *Arrêts du Tribunal féderal suisse*, vol. 80 (1954), II, p. 53.]

Recognition of Acts of Foreign States—Confiscatory Decrees—Decrees Establishing Compulsory Administration of Property—Exterritorial Effect of—The Law of Sweden.

MOLNAR *v.* WILSONS A/B.

Sweden, Supreme Court. May 26, 1954.

THE FACTS.—The plaintiff Molnar, now domiciled in Argentina, had for many years operated his own forwarding agency, under the name Molsped, in Budapest. In the course of business transactions with Wilsons A/B, a credit balance amounting to some 14.200 Swedish crowns accumulated in his favour. In the summer of 1948, Molnar left Hungary because of the political conditions prevailing in that country. In September of the same year he informed the respondent Company that he did not intend to return to Hungary, and requested that the balance standing to his account should not be paid until he himself gave further instructions. Shortly afterwards, he requested the respondent to pay the money to him. The Company did not follow this instruction, giving as the only reason difficulties caused by currency restrictions. Subsequently, Molnar learnt that the respondent Company had received notice from Hungary to the effect that the firm of Molsped was being liquidated and had also been requested by a Hungarian authority to pay the balance to the Liquidator through the Hungarian National Bank. Despite Molnar's instructions, the respondent remitted the sum in question through the Skandinaviska Banken to the Hungarian National Bank. The latter Bank in its turn paid the amount to the Central Currency Institute (Pénzintézeti Központ) which, in February 1949, had been appointed Liquidator of the firm of Molsped. By September 1948, the Hungarian Minister of Commerce, acting by authority of Decree No. 3500/1948 of the Government of the Hungarian Republic, had already appointed an administrator for the firm. Article 1 of the Decree provided that the Minister concerned was entitled to appoint administrators for industrial, mining and smelting enterprises, the operation of which was of importance, *inter alia*, for reconstruction or for the fulfilment of the " three-year plan ". The legal basis of the procedure of liquidation, on the other hand, was said to be the Hungarian Decree No. 560/1949 concerning the liquidation and dissolution of certain enterprises. Article 1 (1) (*c*) of this Decree enabled the Minister concerned to order the dissolution of an enterprise when its debts exceeded its assets or when in some other manner it had become unable to honour its debts, or if it had suspended its payments. In the last-mentioned case it was further provided, however, that at least 50 per cent. of the liabilities must be to the State or to enterprises owned or operated by the State.

The plaintiff contended that an administrator could not legally have been appointed for his firm on the basis of Decree No. 3500/1948, since a forwarding agency could not be regarded as an industrial, mining or smelting enterprise. He submitted, further, that his firm could not legally have been liquidated on the basis of Decree No. 560/1949, since the conditions laid down in that decree were not fulfilled. When the plaintiff had left Hungary, the firm was not, in fact, insolvent. It had had claims amounting to considerable sums, and among the debtors were Hungarian State enterprises. If the firm had later suspended its payments, that must have been done without valid reasons and upon the order of the administrator, whose appointments, as already submitted, was not lawful. In such circumstances, a suspension of payments could not constitute a legal basis for liquidation. Molnar having requested the respondent Company not to pay the balance to anyone but himself, the respondent was under a duty to enquire whether the firm was being liquidated legally. The appointment of a director for the firm, and the liquidation, were evidently a stage in the efforts of the Hungarian authorities to transfer the assets of the plaintiff to the Hungarian State. These measures should be regarded as confiscation. No compensation whatever had been paid to Molnar. Such being the case, and the debt which was the subject of the present action being an asset in Sweden, the measures taken with regard to the firm must at least be regarded as contrary to Swedish *ordre public*. In any event, the Hungarian legislation in question had a public law character; its effect was limited territorially to Hungary; and it could not, in consequence, apply to property situated in Sweden. The plaintiff submitted, therefore, that the respondent Company had paid the money to a person who had no title thereto, and that it was not relieved of its liability to Molnar. In support of his action the plaintiff cited a number of cases decided by Swedish courts, in particular *Weiss* v. *Simon*, decided by the Supreme Court on June 11, 1941 (*Nytt Juridiskt Arkiv*, 1941, p. 441; *Annual Digest*, 1919–1942 (Supplementary Volume), Case No. 57).

The respondent Company admitted that it had become liable to the firm of Molsped to the amount claimed and in the manner described by Molnar. It denied, however, that the plaintiff had a valid claim and contended that under Hungarian law the firm of Molsped was a separate legal entity. It was as such that the firm had been the owner of the debt. It was not disputed that when the claim arose, Molnar was the sole owner of the firm. It was true, also, that the plaintiff had left Hungary in the summer of 1948, but the respondent company had no knowledge of the reason for that action, nor of the economic situation either of the firm of Molsped or of Molnar at that time. The firm of Molsped having been subjected to a process of liquidation, and a request having been made by the Liquidator to the respondent to pay the accumulated balance, the respondent company had not been sure to whom payment should rightly be made and, at first, rejected the request.

Later, however, the respondent Company had paid the balance to the Liquidator through the Skandinaviska Banken, after having secured from the Bank an indemnity against being ordered by a judgment of a Swedish court to pay the balance to Molnar. The respondent Company submitted that by paying the Bank it had discharged its debt to the firm of Molsped and that, consequently, the plaintiff no longer had a claim against it. When making the payment, the respondent had assumed that the Liquidator was legally appointed. The respondent company submitted further that, at the time when the liquidation was ordered, either the firm of Molsped was insolvent or some other condition contained in Article 1 (1) (*c*) of Decree No. 560/1949 had been satisfied. Since the measure of liquidation had been taken by a governmental Hungarian authority, the respondent had seen no reason to question its validity. The respondent denied that the legislation in question was of a confiscatory nature, and that it could not apply to property in Sweden. The respondent company denied, finally, that the legislation had a public law character.

The Central Currency Institute, which intervened in the litigation, joined the respondent Company in resisting the claim. It concurred in the objections raised by the respondent, and added that Molnar had not been subjected to political persecution in Hungary, but had left the country of his own free will. The appointment of an administrator for the firm had been in the interest of the community. At that time the debts of the firm had exceeded its assets. Later the administrator had suspended payments by the firm, and thereafter the liquidation of the firm was ordered. It appeared from the title of the Decree concerning the appointment of administrators that the firm of Molsped had been an enterprise to which the Decree could apply. According to Article 19 (4) of Decree No. 560/1949, assets that might remain when a liquidation was completed were to be surrendered to the owner of the liquidated enterprise. This showed that the legislation was not of a confiscatory nature.

The Court of first instance held that the respondent company must pay Molnar the balance claimed, with interest. It said: " Considering the principles generally applicable regarding territorial limitations in international legal relations, and having regard to the nature and purpose of the administration to which the firm operated by Molnar has been subjected in Hungary ever since September 1948, the compulsory administration cannot be regarded as including property which was already situated in this country before the administration was established.

" Evidence has been given to the effect that the claim of the firm [of Molsped] against the [respondent] Company had already accrued in this country before the establishment of the compulsory administration, and that Molnar was the sole proprietor of the firm at that time. Such being the case, the payment effected by the Company in June 1951 to the Currency Institute—even had the institution of the compulsory administration been valid—has not been made to the right creditor and cannot, therefore, discharge the Company's obligation to pay the money to Molnar."

This decision was upheld by the Court of Appeal of Svea.

On further appeal, to the Supreme Court,

Held: that the appeal must fail and the judgment of the Court of Appeal be confirmed.

[Report: *Nytt Juridiskt Arkiv*, 1954, p. 262.]

Recognition of Acts of Foreign Governments—Confiscatory Legislation—Exterritorial Effect—The Law of Sweden.

Estonian State Shipping Company *v.* Jacobson and Others.

Sweden, Supreme Court. June 9, 1954.

The Facts.—On May 5, 1940, the Estonian ship *Lake Lucerne*, then owned by Jacobson and certain others (hereinafter sometimes referred to as "the old Shipping Company"), went aground in Swedish waters. At the request of the Krediit Pank in Tallin (Estonia), the Enskilda Banken in Stockholm gave a guarantee up to a maximum of 100.000 Swedish crowns to a salvage company for the salvage of the ship. The Enskilda Banken, in turn, was given security to the same amount in an account which the Estonian Bank had with the Swedish Bank. The Enskilda Banken paid some 28.000 crowns under its guarantee, and, subsequently, freed the rest of the account of the Krediit Pank. When it appeared that the remaining amount was being claimed by several parties, the Enskilda Banken, availing itself of the Swedish Law of March 24, 1927,[1] fulfilled its obligation to pay the amount by placing it on public deposit with the competent authority (*Överståthållarämbetet*). These events took place prior to the incorporation of Estonia as part of the U.S.S.R. in 1940. The action of the plaintiff Company in the present litigation was brought to prove that it had a better right to the sum deposited than had the defendants, and to obtain permission to receive the deposited amount. The plaintiff contended that, in conformity with an Estonian regulation of 1940, title to the amount remaining in the account of the Krediit Pank with the Enskilda Banken, had been ceded to the Estonian National Bank, the Eesti Pank in Tallin. Through what the plaintiff termed "legal succession"—an administrative transfer—title to the amount had thereafter passed to the State Shipping Company. The defendants contended that before the Krediit Pank had pledged its account to the Swedish Bank in May 1940, they had paid an amount corresponding to 100,000 Swedish crowns to the Krediit Pank. That Bank, the defendants submitted, had only acted as their agents, and by paying in the amount to the Bank they had acquired title to the sum in the account at the Swedish Bank. The plaintiff contended that the defendants could not claim any title that might have vested in the old shipping company as owners of the *Lake Lucerne.* All the rights formerly vested in that company had passed to the State Shipping Company. The plaintiff further denied that the old shipping company had paid the Krediit Pank in the manner contended by the defendants, and submitted that the Bank, when issuing the security, had not acted as the agent of the old shipping company.

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[1] See *infra*, p. 266, n. 1.

The Court of first instance held that the action must fail, saying: "The fact that the shipping company has been the subject of nationalization in Estonia cannot have any legal effect upon the company's property which is the subject of the present litigation, property which was in this country at the time of the nationalization. . . . For these reasons . . . the [Court of first instance] finds that the State Shipping Company has not shown a better title than the defendants to the deposited amount."

The State Shipping Company having appealed, the Court of Appeal of Svea confirmed the judgment of the Court of first instance.

On further appeal,

Held: that the judgment of the Court of Appeal must be confirmed.

The Court said: "In support of its claim to the deposited amount, the State Shipping Company has referred to a certificate issued on December 6, 1950, by the Deputy Minister of Finance and the Deputy Minister of Justice of the Estonian Soviet Republic to the effect that, in 1940, title to the amount not used of the guarantee sum passed to the State Shipping Company.

"The State Shipping Company has further contended that before May 1940, when the amount was pledged as security, it belonged to the Krediit Pank. It has been stated before the Court that by a Decree of July 23, 1940, the banks in Estonia, *inter alia,* were declared State property, and that in a letter of August 31, 1940, the Krediit Pank (a) informed the Enskilda Banken that 'in conformity with a regulation issued by the authorities' title to the guarantee deposit made by the Krediit Pank had been transferred to the Eesti Pank, and for this reason (b) requested that when the guarantee came to an end, the Enskilda Banken should place at the disposal of the Eesti Pank the amount in the account of the Krediit Pank with the Enskilda Banken which had been pledged as security.

"The State Shipping Company has, it is true, contended that the title to the disputed amount was not affected by the nationalization.

In this respect the Company relies on the fact that before that event the Krediit Pank and the Eesti Pank were already State Banks; that the amount pledged as belonging to these Banks, was State property; and that the vesting of a title to the amount in the State Shipping Company constituted a simple act of transfer between different accounts of the same owner—the State. On the evidence, however, it does not appear that before the nationalization, the Krediit Pank or the Eesti Pank were State Banks in the sense of being owned exclusively by the Government.

" The defendants have contended that the assets of the Krediit Pank were nationalized without compensation being given. This contention is supported by the evidence. . . .

" Considering all the circumstances of the case and with special regard to the fact that the State Shipping Company had the opportunity to submit evidence clarifying the extent and import of the nationalization, but has neglected to do so, the Court finds, on the evidence, that the right claimed by the State Shipping Company derives from a nationalization that has the character of a confiscation. As such nationalization cannot be given legal effect as regards property in Sweden, the State Shipping Company has not proved a better right to the deposited amount."

[Report: *Nytt Juridiskt Arkiv*, 1954, p. 279.]

Recognition of Acts of Foreign Governments—Exterritorial Effect of Confiscatory Legislation—Penal Laws—Whether Valid in respect of Property Situate Outside the Territory—Whether Enforceable in Israel Courts—Anti-Jewish Legislation in Iraq—Public Policy.

ZILKA *v.* DARWISH.

Israel, District Court of Tel Aviv. February 8, 1954.

THE FACTS.—Prior to migrating to Israel, the plaintiff, a banker, had supplied credit to the defendant, a merchant, on current account. The transaction took place in Baghdad (Iraq), in which city the loan was to be repaid. A collateral transaction by way of bills also took place. The present actions (consolidated) were in respect of the loan and in respect of the bills. It was common ground that the proper law of the transaction was the law of Iraq, and that the law of Israel applied as far as concerned the remedies. In January 1950, the defendant illegally left Iraq. On March 4, 1950, a law was enacted in Iraq depriving certain Jews of their Iraqi nationality, and on March 10, 1951, another law was passed, placing under sequestration the property of Jews whose Iraqi nationality had been cancelled as aforesaid.[1] The plaintiff was not an Iraqi national.

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[1] For details of this legislation see *Yearbook on Human Rights for 1950*, p. 157, and *ibid., 1951*, p. 178.

The defendant pleaded, *inter alia,* that the effect of the 1951 Law was to render illegal the discharge of the obligations by him.

Held: that the Iraqi Law could have no effect as regards property situate outside Iraq. The debt was to be discharged in Israel currency at the rate of exchange prevailing in 1949, when it became due.

The Court said: " The argument [that the Laws of 1950 and 1951 cannot be distinguished from the main corpus of Iraqi law as the proper law of the transaction] raises the complicated question of Israel private international law, whether in the circumstances I am free to apply the Iraqi law as if the aforementioned Laws were not part of it, on the ground that a court in Israel is entitled to ignore foreign legislation of a criminal, including confiscatory, character, or a foreign law which runs completely contrary to what the law of Israel regards as consonant with its conceptions of public policy.

" There exists a view according to which an Israel court enjoys some freedom to apply or ignore a foreign law, for the purpose of reaching a just result, after due consideration of all the circumstances. The precedents do not disclose any consistency as to the correct test for this. There are several trends. (A). When Israel private law requires foreign law to apply in determining the existence and contents of a right, the rules of Israel private international law recognize that the foreign legislator may amend or abolish it; *Rouquette* v. *Overmann and Schou,* (1875) L.R. 10 Q.B. 525. This is especially so when the foreign legislator is an enemy in a state of war with us, and his legislation is directed towards strengthening his war effort against us as a nation: *In re Francks and Hasch,* [1918] 1 Ch.D. 470 . . . (B). When the property (in possession or in action) the object of the right is situate within that country, no distinction can be made between criminal (including confiscatory) laws and the main corpus of the foreign legislation applicable by virtue of the rules of private international law: *In re Russian Bank for Foreign Trade,* [1933] Ch.D. 745; *Annual Digest,* 1933–1934, Case No. 55. Nevertheless (i) foreign criminal (including confiscatory) laws directed especially against our citizens (*quaere*: in time of war) may be ignored: *In re Francks and Hasch* (*supra*); *Wolff* v. *Oxholm,* 2 Dig. 160; *In re Fried. Krupp. A.G.,* [1917] 2 Ch.D. 188; (ii) it is perhaps permissible to ignore foreign laws which are fundamentally contrary to Israel public policy, although this is unlikely when that foreign State is recognized *de facto* or *de jure* by us: *Luther* v. *Sagor,* [1921] 3 K.B. 532; *Annual Digest,* 1919–1922, Case No. 25. (C). When the property (in possession or in action) the object of the right is not situate within that foreign country, the foreign criminal or confiscatory law need not be applied even as regards a national of that country: *The Jupiter* (No. 3), [1927] P. 127 ; *Annual Digest,* 1925–1926, Case No. 100 ; *In re Russian Bank for Foreign Trade* (*supra*); *Banco de Vizcaya* v. *Don*

Alfonso de Borbon y Austria, [1935] 1 K.B. 140; *Annual Digest*, 1933–1934, Case No. 56. Nevertheless, when that foreign State, recognized *de jure* or *de facto* by us, has brought property within our territory, and suit is laid against that State in respect to that property, international comity requires the court to recognize the rights of that State or its representatives, without enquiring into the origin of the rights: *Luther* v. *Sagor* (*supra*); *Princess Olga Paley* v. *Weisz*, [1929] 1 K.B. 718; *Annual Digest*, 1929–1930, Case No. 60. (D). In *Amsterdam and Others* v. *Minister of Finance* (*International Law Reports*, 1952, Case No. 50), attention was already given to the special characteristics of confiscatory legislation. The relevant precedents disclose two schools of thought: (1) The classic view, if it may be so termed, reaches its conclusions from the language of the foreign statute, and will not recognize it where it fails to provide (adequate ?) compensation for property confiscated for the benefit of the foreign State or one of its public bodies; *Wolff* v. *Oxhohm*, *In re Russian Bank for Foreign Trade*; or even for private persons nationals of that State; *In re Fried. Krupp A.G.* On the other hand, the law will be given effect when it is no more than a moratorium; *Rouquette* v. *Overmann and Schou*; and contains precautionary measures similar to the general emergency measures enacted by States in time of war; *In re Francks and Hasch.* (2) The modern view, if it may be so called, alive to the trends of racial legislation which have become prevalent in recent times, permits itself to go behind the formal language of the Statute, and will accept evidence of the use to which the Statute is put, excluding the application of the law if it is designed to discriminate: *Frankfurther* v. *W. H. Exner Ltd.*, [1947] Ch. 629; *Annual Digest*, 1947, Case No. 4."

[At this point the Judge examined the Iraqi laws and compared them with the Israel Absentee Property Law, 1950, and the decision of the House of Lords in *Arab Bank Ltd.* v. *Barclay's Bank Ltd.*, (1953) 2 All E.R. 263. Since no evidence had been brought as to the method of applying the law in Iraq, the Judge decided to rely upon his judicial knowledge in excluding its application to the present transaction. He gave the following reasons:] ". . . The object of this litigation was not situate in Iraq but elsewhere, apparently in Israel, when the Iraqi legislation was passed . . . The bills gave Baghdad as place of payment, but not only Baghdad, and it is not denied that the defendant had left Iraq for good before the laws were passed. . . . No diplomatic relations exist between Israel and Iraq. Indeed, some may think that their relations are a state of war, or at least of quasi-war. In those circumstances I do not have to keep in mind those considerations [relating to the comity of nations] which weighed so heavily with Scrutton L.J. in *Luther* v. *Sagor*.

" Since I have a certain freedom of action as regards the foreign law . . . I am inclined to disregard the Iraqi law as far as concerns assets situate outside Iraq. The legislation seems to me too general, and appears to affect every Jew who was deprived of his Iraqi nationality, without distinguishing between a Jew who migrated to Israel, a Jew who left Iraq for some State friendly to Iraq, and a Jew who ultimately remained in Iraq despite having lost his nationality. Furthermore, it seems that the law leads to consequences more serious than those found in regulations the primary purpose of which is to protect the country's economic stability. No compensation was provided for, and no possibility of sale, even under the supervision of the authorities.

" The amount due to the plaintiff is 9,200 Iraqi Dinars. But a judgment of an Israel court must be expressed in terms of Israel currency. The question arises of the rate of exchange. I am obliged to follow the decision of the Privy Council in *Khoury* v. *Khayat*, 10 Palestine Law Reports (1943), p. 271, according to which the rate of exchange is that prevailing on the date of maturity . . . There is no dispute that on that date the prevailing rate was ID. 1=IL. 1 . . ."

[Report: *Pesakim Mehoziim*, vol. 11 (1955), p. 107.]

Recognition of Foreign Legislation—Limits of—Confiscation of Property by Foreign State—Exterritorial Effect of—Expropriation of Hungarian Company—Whether Hungarian " National Enterprise " Substituted for Company Entitled to Claim Property of Company Situate in Austria.

Danuvia Feinmechanische und Werkzeugfabrik Nationalunternehmen *v.* Seiberth.

Austria, Supreme Court. February 3, 1954.

The Facts.—The plaintiffs were a Hungarian " national enterprise " which, by virtue of a Hungarian Decree, had been substituted for a Company previously registered in Hungary. The Decree, which transferred all the assets of the Company to the national enterprise, provided that compensation would be paid and that the terms of payment of such compensation would be laid down in a law to be enacted at some future date. Before its nationalization the Company had sent certain machinery to the defendant in Austria, and in the present action the plaintiffs claimed to be entitled to that machinery, as successors in title of the nationalized Hungarian Company. On behalf of the defendant it was contended that the Hungarian Decree, which contained only a vague promise of compensation, was in fact confiscatory and could not, therefore, be recognized as transferring a valid title to the Company's machinery in Austria, and that the action should be dismissed.

Held: that the Hungarian Decree was confiscatory and therefore incapable of transferring to the plaintiffs a valid title to the former

Company's property in Austria, and that the action must accordingly be dismissed.

The Court said: " The Courts below (in dismissing the action) followed the view which is now generally accepted with regard to the validity of foreign confiscatory measures *quoad* property situate in Austria. The Supreme Court accepts this view, which is amply supported by numerous decisions and bibliographical references. The appellants contend, above all, that the transformation of the Hungarian Company cannot be regarded as confiscatory because Article 25, para. 14, of the Hungarian Decree of 1948 declares that the nationalization is effected against payment of compensation to be provided for by a special law. All we have here, therefore, is an entirely vague promise that compensation of an uncertain amount may be paid; the lower Courts do not regard the implementation of that promise as being at all probable. A promise of this nature cannot divest the nationalization of the character of a confiscation. The Courts below did not find that the Hungarian Government has paid appreciable sums in compensation in the past . . . It follows, therefore, that those who have taken over the Austrian property of the Company are liable, to the extent of the assets so taken over, to the creditors of the Company. The uncertainty of the position thus arising may cause a certain amount of difficulty to the creditors, but it is not such as to affect the basic view taken by the Austrian State with regard to foreign confiscations."

[Report: Zl. 1 Ob 996/53.][1]

NOTE.—In its judgment of June 5, 1953 (which is not reported), the lower Court (District Court of Wels) expressed the view that where a foreign company has been nationalized, " a general meeting held by the former shareholders in Austria and resolutions passed thereat must be regarded as legally irrelevant and of no effect."

Recognition of Acts of Foreign States and Governments—Extraterritorial Effect with Consent of Enforcing State—Implied Consent—Operation of United States Trading with the Enemy Act within Philippine Territory.

BROWNELL, AS ATTORNEY-GENERAL OF THE UNITED STATES *v.* SUN LIFE ASSURANCE COMPANY OF CANADA.

Philippines, Supreme Court. June 22, 1954.

THE FACTS.—The defendant issued an endowment policy to one Naogiro Aihara, a Japanese national, and his wife. The policy having matured in 1946, the plaintiff brought an action to recover one half of the proceeds of the policy, which was due to Aihara. The action was brought under the provisions of the Philippine

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[1] See also the note by Seidl-Hohenveldern in *American Journal of Comparative Law*, 4 (1955), pp. 242–245.

Property Act of 1946,[1] which provided that the United States Trading with the Enemy Act of October 6, 1917, should continue in force in the Philippines after that Commonwealth had become independent. Prior to the enactment of the statute, the President of the Philippines and the United States High Commissioner to the Philippine Islands had agreed that title to enemy property located in Philippine territory which had vested in the United States pursuant to the Trading with the Enemy Act was to be transferred to the Philippines, but that, to avoid complex legal problems in relation to enemy property, the Alien Property Custodian of the United States was to continue operations in the Philippines after the latter became independent.[2] Section 3 of the Philippine Property Act of 1946 provided for the transfer of this property to the Philippines. When the independence of the Philippines was proclaimed on July 4, 1946, it was granted " in accordance with and subject to the reservations provided in the applicable statutes of the United States ".[3]

The Philippine Congress enacted legislation authorizing the President of the Philippines to accept such transfers from the United States,[4] and providing for the administration and disposition of the property after transfer.[5] However, none of the statutes contained a provision making the Philippine Property Act of 1946 applicable to the Philippines.

The defendant challenged the applicability of the Trading with the Enemy Act in the Philippines. It contended that the Act had not been adopted by any law of the Philippines and that it therefore was without effect in Philippine territory. The Court of First Instance of Manila found for the plaintiff, and the defendant appealed.

Held: that the decision of the Court of First Instance must be affirmed. A foreign statute may be given effect in another State with the consent of that State. In this instance, consent is implied in the provisions of Philippine law accepting the benefits of the United States Philippine Property Act of 1946.

The Court said: " There is no question that a foreign law may have extraterritorial effect in a country other than the country of origin provided the latter, in which it is sought to be made operative, gives its consent thereto. This principle is supported by unquestioned authority.

> 'The jurisdiction of the nation within its territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed

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[1] 60 United States Statutes at Large 418 (1946), 22 U.S.C. §§ 1381–86 (1952).

[2] See joint statement by President Roxas and Commissioner McNutt, United States Senate Report No. 1578, 81st Cong. (1946).

[3] 60 United States Statutes at Large 1352 (1946), 11 Fed. Reg. 7517 (1946); 42 Off. Gaz. 1624 (1946).

[4] Republic Act No. 8, 42 Off. Gaz. 1796 (1946).

[5] Republic Act No. 7, 42 Off. Gaz. 1795 (1946); Republic Act No. 477, 46 Off. Gaz. 2981 (1950).

> by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which would impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. This consent may be either express or implied.' (Philippine Political Law by Sinco, pp. 27–28, citing Chief Justice Marshall's statement in *The Exchange*, 7 Cranch 116).

" In the course of his dissenting opinion in the case of *S. S. Lotus*[1], decided by the Permanent Court of International Justice, John Bassett Moore said:

> '1. It is an admitted principle of international law that a nation possesses and exercises within its own territory an absolute and exclusive jurisdiction, and that any exception to this right must be traced to the consent of the nation, either express or implied (*Schooner Exchange* vs. *McFadden* [1812], 7 Cranch 116, 136). The benefit of this principle equally inures to all independent and sovereign States, and is attended with a corresponding responsibility for what takes place within the national territory.' (Digest of International Law, by Hackworth, Vol. II, pp. 1–2).

" The above principle is not denied by respondent-appellant. But its argument on this appeal is that while the acts enacted by the Philippine Congress impliedly accept the benefits of the operation of the United States law (Philippine Property Act of 1946), no provision in the said acts of the Philippine Congress makes said United States law expressly applicable. In answer to this contention, it must be stated that the consent of a State to the operation of a foreign law within its territory does not need to be express; it is enough that said consent be implied from its conduct or from that of its authorized officers.

> '515. *No rule of International Law exists which prescribes a necessary form of ratification.*—Ratification can, therefore, be given tacitly as well as expressly. Tacit ratification takes place when a State begins the execution of a treaty without expressly ratifying it. It is usual for ratification to take the form of a document duly signed by the Heads of the States concerned and their Secretaries [for] Foreign Affairs. It is usual to draft as many documents as there are parties to the Convention, and to exchange these documents between the parties. Occasionally the whole of the treaty is recited verbatim in the ratifying documents, but sometimes only the title, preamble, and date of the treaty, and the names of the signatory representatives are cited. As ratification is only the confirmation of an already existing treaty, the essential requirement in a ratifying document is merely that it should refer clearly and unmistakably to the treaty to be ratified. The citation of title, preamble, date, and names of the representatives is, therefore,

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[1] See *Annual Digest*, 1927–1928, Case No. 98.]

> quite sufficient to satisfy that requirement.' (Oppenheim, pp. 818–819: italics ours.)
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> 'International law does not require that agreements between nations must be concluded in any particular form or style. The law of nations is much more interested in the faithful performance of international obligations than in prescribing procedural requirements.' (Treaties and Executive Agreements, by Myres S. McDougal and Asher Lands, Yale Law Journal, Vol. 54, pp. 318–319).

In the case at bar, our ratification of or concurrence to the agreement for the extension of the Philippine Property Act of 1946 is clearly implied from the acts of the President of the Philippines and of the Secretary of Foreign Affairs, as well as by the enactment of Republic Acts Nos. 7, 8, and 477.

"We must emphasize the fact that the operation of the Philippine Property Act of 1946 in the Philippines is not derived from the unilateral act of the United States Congress, which made it expressly applicable, or from the saving provision contained in the proclamation of independence. It is well-settled in the United States that its laws have no extraterritorial effect. The application of said law in the Philippines is based concurrently on said act (Philippine Property Act of 1946) and on the tacit consent thereto and the conduct of the Philippine Government itself in receiving the benefits of its provisions."

[Report: Off. Gaz., 50 (1954), 4814.]

Recognition of Acts of Foreign Governments—Confiscatory Decrees—Exterritorial Effect of—The Law of Sweden.

See p. 265 (*Bulgarian State* v. *Takvorian*).

V.—Continuity of States

[*See also below*, E, State Succession.]

States—Continuity of—Factual Division of Former German Reich into Separate Entities—Trial of Criminal in German Federal Republic—Previous Conviction in Soviet Zone of Germany—Whether Such Conviction Constitutes a Conviction Obtained "in Germany"—Liability to Punishment as Recidivist—The Law of Germany.

Recidivism (Soviet Zone of Germany) Case.

German Federal Republic, Federal Supreme Court. February 11, 1954.

The Facts.—Section 264 of the German Penal Code provides that a person twice previously convicted of fraud "in Germany" (*im Inland*) may be punished as a recidivist if convicted of a similar offence on a subsequent occasion. The appellant, who had been convicted of fraud by a Court in the Soviet Zone of Germany and subsequently by a Court in the Federal Republic, contended, on the occasion of his third trial before a Court of the Federal Republic, that he was not liable to punishment as a recidivist, on the ground that the conviction obtained against him in the Soviet Zone was not a conviction obtained " in Germany ". The prosecution contended that, for the purpose of s. 264 of the German Penal Code, the Soviet Zone was part of Germany and that the conviction obtained against the appellant in that Zone was therefore a conviction obtained " in Germany ".

Held: that the contention of the prosecution was correct and that the appellant was accordingly liable to punishment as a recidivist.

The Court said: " The notice of appeal rightly contends that the previous conviction must have been obtained ' in Germany '. The Eastern Zone, however, forming as it does part of the whole of Germany, must be regarded as ' Germany ' (*Inland*) within the meaning of s. 264 of the Penal Code. This proposition is generally accepted by writers and has previously been adopted by this Court. The Legislature of the Federal Republic shares this view. . . . A sentence pronounced by a Court of the Soviet Zone must be executed in the Federal Republic unless, having regard to democratic principles, it is unreasonable in kind or severity, or violates the object of a federal Law. Accordingly, the judgments of German Courts in the Soviet Zone in criminal matters are regarded as judgments of German Courts and are recognized in the Federal Republic subject to certain limitations, so that there is no objection to their being treated as convictions which may lead to punishment for recidivism within the meaning of s. 264 of the Penal Code. . . . The Court below was therefore right in taking into consideration the conviction obtained before the Court in the Soviet Zone."

[Report: *NJW*, 7 (1954), p. 808.]

States—Continuity of—Factual Division of Former German Reich into Separate Entities—Effect on Nationality.

Re LACHINGER.

German Federal Republic, Federal Supreme Court. February 23, 1954.

THE FACTS.—The Austrian Government requested the Federal Republic of Germany to extradite Lachinger, who was alleged to have committed certain criminal offences in Austria. He was willing to be extradited, but he alleged that he had been naturalized in the Soviet Zone of Germany by being told by a police official there that he was a " German national ", and that he had subsequently been handed an identity card describing him as such.[1]

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[1] Article 16 (2) of the Constitution of the Federal Republic of Germany provides that German nationals shall not be extradited.

Section 16 (1) of the German Nationality Law of July 22, 1913, provides that naturalization shall become effective upon the issue of a naturalization certificate by the higher administrative authorities. The Court dealing with the Austrian request for the extradition of L., having regard to Article 16 (2) of the Constitution of the German Federal Republic, submitted—as far as here material—the following question to the Supreme Court:

> " Is the validity of the acquisition of German nationality in the Soviet Zone to be recognized in the Federal Republic of Germany only where a document issued in accordance with section 16 (1) of the Nationality Law [of July 22, 1913] has been handed over ? "[1]

Held: (i) (without deciding the general question whether the courts of the Federal Republic of Germany are bound to apply the laws of the Soviet Zone) that there was only one German nationality, and not two, and that the question of the validity of a naturalization must be determined in accordance with section 16 (1) of the German Nationality Law of July 22, 1913; (ii) that as the informal statement that Lachinger was a German national, followed by the issue of an identity card describing him as such, did not satisfy the requirements of section 16 (1) of the Nationality Law, Lachinger was an Austrian citizen and therefore liable to be extradited.

The Court said: " The only question before the Court is whether, and under what conditions, the naturalization of a foreign national in the Soviet Zone must be regarded as valid in the Federal Republic. The Court shares the view of the Public Prosecutor that the present case does not require a determination of the basic general question as to whether acts of naturalization by the authorities of the Soviet Zone must be determined by the courts and executive authorities of the Federal Republic in accordance with our constitutional and administrative law or in accordance with the law of the Soviet Zone. We must proceed on the basis that there is only one German nationality, and not two distinct nationalities, *viz.*, one in the Federal Republic and one in the Soviet Zone. The German Reich did not disintegrate into two separate and independent States. According to the view generally held and applied by the courts and administrative authorities of the two parts of Germany, Germany is a unitary State in which two different, and territorially limited, legal systems have grown up. It follows that the generally recognized principle of the conflict of laws whereby the question of nationality has to be determined exclusively in accordance with the law of the State whose nationality is in issue, cannot simply be applied as between the Federal Republic and the Soviet Zone. As far as the Federal Republic is concerned, this is not a case of 'recognition' of a foreign nationality, *viz.*, the nationality of the Soviet Zone, but a question of the validity of the acquisition of our own German nationality by virtue of laws enacted in a part of Germany at present under Soviet occupation. Accordingly, though the acquisition of German nationality in the Soviet Zone is not, in principle, to be determined in accordance with the law applicable in that Zone, it does not follow that, basically and exclusively, only the law of the Federal Republic must be applied. The Court need not determine this question.

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[1] The other question was concerned with the nationality of L. prior to his " naturalization " in the Soviet Zone. The Court held that as Lachinger was an Austrian by origin who had acquired German nationality after the incorporation of Austria into the German Reich, he had again become an Austrian citizen after the severance of Austria from the Reich.

"As we have already pointed out, there are not two separate nationalities in the two parts of Germany. A nationality acquired by a person in one part by virtue of birth or any other mode of acquisition which is recognized in both parts is at the same time the nationality of the other part. It follows necessarily that the Federal Republic cannot recognize as valid the acquisition of German nationality in the Soviet Zone if such recognition is contrary to the object of a Law which is in force in the Federal Republic, or is contrary to the public policy of the Republic. Such acquisition cannot even be recognized if it is in accordance with a Law applicable in the Soviet Zone which deviates from our Law. In a case such as the one now before us, the vital interests of the Federal Republic are in issue, which is not the case where a foreign nationality is concerned. It is a fundamental right of every State to refuse the reception of undesirable aliens into its bond of nationality. . . . Aliens who may have been naturalized by the Soviet authorities in disregard of the minimum requirements of the Nationality Law of July 22, 1913, need not be treated as Germans in the Federal Republic, even though a law enacted in the Soviet Zone may have dispensed with these minimum requirements and may have left naturalization to the discretion of the Soviet authorities. This rule applies to the formal requirements contained in section 16 (1) of the Nationality Law according to which naturalization becomes effective upon the issue of a naturalization certificate by the higher administrative authorities. . . . In view of the foregoing, the Court need not elaborate that the issue of an identity card, or a verbal statement, does not satisfy the requirements governing the form of naturalization as provided in section 16 (1) of the Nationality Law. The Court has thus laid down the limits of recognition to be accorded to the rules of the Soviet Zone governing naturalization."

[Reports: BGH St, 5 (1954), p. 317; NJW, 7 (1954), p. 651.]

B—COMPOSITE AND DEPENDENT STATES AND TERRITORIES

II.—British Commonwealth of Nations

British Commonwealth of Nations—Impact of Independence of India on Extradition Within the Commonwealth—India as Foreign Territory.

THE STATE OF MADRAS *v.* MENON AND ANOTHER.

India, Supreme Court. May 19, 1954.

(Mahajan C.J.; Das, Hasan, Bhagwati and Jagannadhadas JJ.)

THE FACTS.—This was an appeal from an order of the High Court of Madras relating to the extradition of the respondents from India to Singapore which was requested by the Colonial Secretary of Singapore. The respondents were Indian nationals resident in Singapore, and warrants had been issued for their arrest and return to Singapore. The offences alleged to have been committed by them were non-political (criminal breach of trust, etc.). The High Court had declared s. 14 of Part II of the Fugitive Offenders Act, 1881 (an Act of the British Parliament), with reference to which extradition was considered, inoperative against the respondents, who had invoked a fundamental right guaranteed under Article 14 of the Constitution, namely, the right of equality.

Held: that the decision of the Court below refusing extradition of the respondents must be upheld " though on a ground different from that on which that Court decided in favour of the respondents ".

The Court said: " The scheme of the Fugitive Offenders Act is that it classifies fugitive offenders in different categories and then prescribes a procedure for dealing with each class. As regards persons committing offences in the United Kingdom and British Dominions and foreign countries in which the Crown exercises foreign jurisdiction, the procedure prescribed by Part I of the Act has to be followed before they can be surrendered, and unless a *prima facie* case is made out against them they cannot be extradited.

" Extraditions *inter se* between British possessions, however, were dealt with differently by the Act (Part II). They were grouped together according to their contiguity, etc., by an Order-in-Council, and treated as one territory. This grouping was subject to alterations and modifications by Order-in-Council, and conditions of extradition could also be prescribed by such an Order.

" It is plain from the [above] provisions of the Act, as well as from the Order-in-Council, that British possessions which were contiguous to one another and between whom there was frequent intercommunication (such as British India, the Straits Settlements, etc.), were treated for the purposes of the Fugitive Offenders Act as one integrated territory, and a summary procedure was adopted for the purpose of extraditing persons who had committed offences in these integrated territories. As the laws prevailing in those Possessions were substantially the same, the requirement that no fugitive shall be surrendered unless a *prima facie* case is made against him was dispensed with. (Under the Indian Extradition Act, 1903, a similar requirement was also insisted upon before a person could be extradited.)

"The situation completely changed when India became a Sovereign Democratic Republic. After the achievement of Independence and the coming into force of the new Constitution by no stretch of imagination could India be described as a British Possession and it could not be grouped by an Order-in-Council amongst those possessions. Truly speaking it became a foreign territory so far as other British Possessions (*e.g.* Singapore) are concerned, and the extradition of persons taking asylum in India, who had committed offences in British Possessions, could only be dealt with by an arrangement between the Sovereign Democratic Republic of India and the British Government and given effect to by appropriate legislation."

The provisions of the Fugitive Offenders Act could have been made applicable to India by incorporating them, with appropriate changes, into an Act of the Indian Parliament and by enacting an Indian Fugitive Offenders Act. In the absence of any legislation on those lines the whole basis of the applicability of Part II of the Fugitive Offenders Act, 1881, had gone.

[Report: A.I.R., 1954, Supreme Court 517.]

IV.—Mandated and Trust Territories

i.—Sovereignty over Mandated and Trust Territories. Status of Mandated and Trust Territories.

Mandated Territory—Termination of Mandate—Recognition of Independent States—End of Palestine Mandate—Israeli Trading with the Enemy Legislation.

See p. 443 (*Arab Bank Ld.* v. *Barclays Bank*).

ii.—Rights and Duties of the Administering Authority.

Mandated Territories—Rights and Duties of Mandatory—Mandate for Palestine—Powers of Mandatory's Consular Officials—Interpretation by Israel Court of Law of Palestine.

See p. 250 (*Gorali* v. *Diskin*).

D—RECOGNITION

[*See also above*, A, IV, Recognition of Acts of Foreign States and Governments; *and* PART IV, JURISDICTION: A, I, Territorial.]

I.—Of States

Recognition—Of States—Effects of Non-Recognition—Capacity to Sue—Republic of the South Moluccas.

REPUBLIC OF THE SOUTH MOLUCCAS *v.* NETHERLANDS NEW GUINEA.

Holland, President of the District Court of The Hague in Summary Proceedings. February 10, 1954.

THE FACTS.—In April 1950 the Republic of the South Moluccas had proclaimed itself to be a sovereign State, independent of the Republic of Indonesia. The Government of the Netherlands did not grant recognition either to this Republic or to any other government of the South Moluccas. The purpose of this action in summary proceedings was to obtain from the President of the District Court, pending the decision on the merits of the claim in ordinary proceedings, an interim order precluding the Government of Netherlands New Guinea—a Netherlands overseas territory adjoining the Islands of the Moluccas—from handing over to the Government of Indonesia a vessel claimed by the Republic of the South Moluccas. The Government of New Guinea, as defendant, submitted that the claimant Republic had no legal personality.

Held (by the President): that the plea that the Republic of the South Moluccas has no legal personality must be dismissed.

The President said: " The Court of Justice of New Guinea in its judgment of March 7, 1952, which has become final, admitted the claimant Republic as a party to the proceedings and has therefore recognized its legal personality. The Court in that judgment referred to and followed a previous judgment of the Court of Appeal of Amsterdam, given on January 8, 1951. In such circumstances, a President seised in summary proceedings of an application for interim measures must take into account the possibility that his Court, when considering the merits of the case, will take the same view unless it were to appear during the summary proceedings that the claimant has in the meantime lost its legal personality. In this respect no further *prima facie* evidence has been submitted than that a number of former high Government officials of the claimant Republic are being held prisoner by Indonesia. The parties even fail to agree as to whether the Head of State of the Republic of the South Moluccas is still holding office and whether the claimant is exercising the functions of an established Government over any territory. In the absence of reliable data from which it would follow that the claimant has lost its legal personality since the previous judgments were given, it must also in the present action be held to have legal personality. Therefore the Government of the Republic of the South Moluccas must be admitted as a party to the proceedings."

[Report: *N.J.*, 1954, No. 549.]

NOTE.—See also the judgments of the Court of Appeal of Amsterdam of January 8, 1951 (*N.J.*, 1951, No. 129) and of the Court of Justice of New Guinea of March 7, 1952 (*ibid.*, 1953, No. 100). And see the article by Bos on the judgment of the Court of Appeal of Amsterdam, *supra*, in Clunet, *Journal du droit international*, 1953, pp. 286–309 (with an English translation).

Recognition—Of States—Effects of—Trading with the Enemy Legislation—Recognition of Israel and of Jordan—Effect of War on Contracts.

See p. 443 (*Arab Bank Ld.* v. *Barclays Bank*).

Recognition—Of States –Effects of Non-recognition—Jordan and Israel.

See p. 457 (*Ottoman Bank* v. *Jabaji*).

II.—Of Governments

Recognition—Of Governments—*De facto* Governments—Kinds of—Local *de facto* Government.

See p. 55 (*Socony Vacuum Oil Company Claim*).

Recognition—Of Governments—Deportation of Alien to Territory Controlled by Government Not Recognized by Deporting State.

See p. 225 (*United States ex rel. Leong Choy Moon* v. *Shaughnessy*).

E—STATE SUCCESSION

II.—Succession with Regard to Contractual and Other Obligations, and Concessions

State Succession—Succession to Obligations—Contractual Obligations—Railways of German Reich Operating in French Alsace during Second World War—Settlement of Passenger's Claim for Injuries Resulting from Accident—Whether Railway Administration of Federal Republic of Germany Bound by Terms of Settlement—The Law of Germany.

RAILWAY ACCIDENT CASE.

German Federal Republic, Federal Supreme Court. June 9, 1954.

THE FACTS.—In 1942 the plaintiff sustained personal injuries while travelling in a train in French Alsace, where all train services were then being operated by the Railway Administration of the German Reich. The Railway Administration of the Reich admitted liability, and the settlement between the parties provided for the payment of a capital sum and a pension payable at regular intervals. The capital sum was duly paid. The instalments due on the pension were initially paid by the Railway Administration of the Reich and subsequently by the Railway Administration of the Federal Republic of Germany. From 1947 onwards, however, the Railway Administration of the Federal Republic paid a smaller pension than had originally been agreed, and they also refused to admit liability for the plaintiff's pension claim, on the ground that this liability did not relate to that part of the assets of the Railway Administration of the Reich which the Railway Administration of the Federal Republic had taken over. On behalf of the plaintiff it was contended, so far as is here material, that the Railway Administration of the Federal Republic was identical in law with the Railway Administration of the Reich, and that the former was therefore liable for the debts of the latter. The plaintiff was successful in the Court of first instance and in the Court of Appeal. The Federal Railways now appealed further to the Supreme Court.

Held: that the appeal must be allowed and the action dismissed.

The Court said: " The defendants are not responsible for these liabilities under the Law on Federal Railways because there is no such territorial relationship as is required by the Legislature in order to form the basis of the defendants' liability. The liabilities must have arisen in connection with the operation of those railways which form part of the assets of the Federal Railways. This is not the case where we are concerned with a liability which has arisen from the operation of railway lines situate outside the territory of the Federal Republic. . . . It follows that where persons have been injured in trains operating in Alsace, the liability of the Federal Railways cannot be founded on the Law on Federal Railways. There was no reason why the Legislature should have burdened the Federal Railways, which were able to take possession only of part of the assets of the Reich Railways, with liabilities of the latter which are in no way connected with the present assets of the Federal Railways. The fact that the railways operating in Alsace were administered on behalf of the Reich Railways by the branch office in Karlsruhe, and that to that extent the manager of that branch office administered the Reich Railways, cannot—contrary to the view expressed by the Court of Appeal—form the basis of any liability of the Federal Railways. In this context it cannot make any difference that in the present case the plaintiff bases his claim not on the accident itself but on the contractual arrangement between himself and the Reich Railways . . .

" Even in cases of State succession, the liability of the new owner of the assets is by no means automatic. We are not concerned with the determination of the question whether, as the appellants contend, the owner of the railways situate in Alsace is liable for the accident and its consequences. There are no other grounds from which the liability of the defendants can be inferred. The concept of partial identity between the Reich Railways and the Federal Railways, as well as the concept of functional succession, presuppose that the liability in issue is one related to the assets which have been transferred. This requirement, however, is lacking where, as here, the claim arises from an accident which occurred outside the territory under the administration of the Federal Railways. The plaintiff's claim therefore continues to be an obligation of the German Reich which has not yet been the subject of legislation."

[Report: JZ, 10 (1955), p. 19.]

State Succession—Succession to Obligations—Respect for Private Rights—Treaties—Merger of States—Jurisdiction of Municipal Courts relating to Rights Arising Out of Treaties—The Law of India.

DALMIA DADRI CEMENT COMPANY *v.* COMMISSIONER OF INCOME TAX.

India, High Court of Patiala and East Punjab States Union.

June 7, 1954.

(Chopra and Gurnam Singh JJ.)

THE FACTS.—On April 1, 1938, the applicant, the Dalmia Dadri Cement Co., Ltd., of Dadri, entered into an agreement with the Ruler of the former Jind State by which that State granted and conferred upon the Company the sole and exclusive monopoly right of manufacturing cement in the Jind State for a period of 25 years. It was laid down in the agreement that the Company should pay income tax at the rate of four per cent. up to a limit of income of Rs.500.000 (five lacs), and five per cent. on income in excess of Rs.500.000. On August 15, 1947, the Ruler of the Jind State, like many other Indian Rulers, acceded to the Dominion of India with respect to defence, external affairs, and communications. On May 5, 1948, the Rulers of eight Indian States (including the Ruler of Jind) entered into a Covenant to form a new State, called the Patiala and East Punjab States Union (PEPSU), as one of the member States of Federal India. The Head of this new State (Rajpramukh) introduced in its territory the Patiala Income Tax Act of 2001 (A.D. 1944), and the Company was consequently assessed for income tax under this Act. The company contended that according to the terms of its agreement with the Ruler of Jind it could only be charged at a fixed rate (4 per cent.) on its income, and the Appellate Tribunal which considered the complaint stated a case to the High Court of PEPSU. The Commissioner of Income Tax contended that the Covenant was a treaty between the eight Sovereign States, by which they ceded their territories and sovereignty and formed a new State. The Treaty being an act of State, the validity of anything done under it by the new sovereign was outside the competence of the municipal courts. The applicant Company, which did not accept that proposition, maintained that the Covenant was not a treaty of cession but a kind of constitutional charter, and that the laws promulgated by the Rajpramukh, including income tax laws, could not contravene its provisions. It was also contended by the applicant " that apart from the provisions in the treaty devolving the obligations and liabilities of the covenanting States upon the new State, rules of international law require that an absorbing State while succeeding to the assets should also honour the obligations and liabilities of the ceding State ".

Held: that " the Covenant was an act of State and should more appropriately be regarded as a treaty. It is not within the province of municipal courts to enforce or grant relief in respect of rights . . . arising out of a treaty . . . In any case, legislation otherwise validly made and promulgated by the new State (such as the Income Tax Act) cannot be regarded as invalid and inoperative because it is not in consonance with, or contravenes, . . . supposed principles of international law. Therefore, no relief on that account can be granted by municipal courts to persons adversely affected thereby."

The Court continued: " The Covenant was brought into existence by the exercise of the sovereign powers of the Rulers as a matter of policy in the course of their relations with one another. In my judgement, therefore, the Covenant was an act of State and should more appropriately be regarded as a treaty. It was not meant to be an instrument embodying the fundamental organic law or all the principles of government of the new State, and cannot in consequence acquire the status of a Constitution.

" The question then arises whether a law otherwise validly promulgated by the Rajpramukh, can be regarded as invalid or inoperative if it ignores or is in contravention of something contained in the Covenant. To be more precise, the question is whether the company can take advantage of the agreement with the Ruler of Jind, the obligation under which is said to have devolved upon the new State according to Art. V (*b*) or (*c*) of the Covenant, in spite of subsequent legislation ignoring that agreement and the obligation thereunder, and can be heard to say that the subsequent law is invalid or inoperative so far as his rights under the agreement are concerned. Once it has been found and held that the Covenant is a kind of treaty and an act of State, the question must be answered in the negative. It is not within the province of municipal courts to enforce or grant relief in respect of rights . . . arising out of a treaty. The transactions of independent States between one another are governed by laws other than those which the municipal courts administer, and rights supposed to be acquired thereunder cannot be enforced by such courts. Relief in such cases has to be sought not in the precincts of courts of law but in the corridors of diplomacy. The rights against the previous Sovereign ceased to exist. Legally enforceable rights against the new Sovereign are those, and only those, which that Sovereign by subsequent agreement or recognition, express or implied, or by legislation chooses to confer. Any obligation assumed under the treaty either to the ceding Sovereign or to individuals is not one falling within this category. The principle that any rights purporting to be conferred by the treaty of cession cannot be enforced in the municipal courts, except in so far as they have been incorporated in municipal laws, appears now to be well settled. It has been uniformly recognized and followed by their Lordships of the Privy Council in a number of decisions extending over the past century."[1]

" In my judgement, the validity of the subsequent law enforcing the Patiala Income Tax Act as being applicable to all the subjects of the Union, and thereby abrogating the agreement between the Ruler of Jind and the Company, cannot be impugned on the ground that it contravenes a term of the Covenant, according to which all duties and obligations of the Ruler devolved on and were to be discharged by the Union. It is not disputed that the rights of the Company under the agreement and the consequent obligation of the Ruler of Jind were not recognized by the new State by means of any express legislation, or even impliedly by any conduct on its part. On the other hand, the agreement—and hence the obligation—was repudiated by the Rajpramukh on the very first day he assumed administration, by the promulgation of a uniform law for the whole of the Union. This contention of the Company must therefore fail.

" Next, it is contended that apart from the provision in the treaty devolving the obligations and liabilities of the Covenanting States upon the New State, the rules of international law require that an absorbing State while succeeding to the assets should also honour the obligations and liabilities of the ceding State, and that the change of government should not affect adversely the vested property rights of the subjects. The right to exemption from taxation being a property right, the new legislation which ignored or abrogated that right of the company, it is contended, was invalid and ineffective since it contravened a well-recognized principle of international law. In the first instance, it is not possible to say that there is any universally and uniformly recognized rule of international law to the effect that an absorbing State is bound by rights and monopolies arising out of contracts with or concessions granted by the ceding State . . . The writers on the subject . . . do not seem to be unanimous or uniform in their views.[1]

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[1] The Court quoted the following cases in support: *Secretary of State* v. *Kamachee Baye Sahaba*, 7 Moo. Ind. App. 476 (P.C.) (L); *Rustomjee* v. *The Queen*, (1876) 1 Q.B.D. 487 (M) and (1876) 2 Q.B.D. 69 (11); *Cook* v. *Sprigg*, [1899] A.C. 572 (Q); *West Rand Central Gold Mining Co. Ltd.* v. *The King*, (1905) 2 K.B. 391 (P); *Secretary of State* v. *Bai Rajbai*, A.I.R. 1915 P.C. 59 (Q); *Vajesinghji Jorawar Singhji* v. *Secretary of State*, A.I.R. 1924, P.C. 216 (R); *Sobhuza II* v. *Miller*, A.I.R., 1926, P.C. 131 (S) [*Annual Digest*, 1925–1926, p. 40]; *Civilian War Claimants' Association* v. *The King*, [1932] A.C. 14 (T) [*Annual Digest*, 1931–1932, Case No. 118].; *Secretary of State* v. *Rustam Khan*, A.I.R., 1941, P.C. 64 (U) [*Annual Digest*, 1941–1942, Case No. 21] [1941] A.C. 308 (V); *Asrar Ahmed* v. *Durgah Committee, Ajmer*, A.I.R., 1947, P.C. 1 (W) [*Annual Digest*, 1946, Case No. 17]; *Phaltan Sugar Works Ltd.* v. *Commissioner of Income Tax*, A.I.R., 1950, Bom. 61 (X); *Shambhu Dayal* v. *Patiala and East Punjab States Union*, A.I.R., 1952, Pepsu 152 (Y).

" Under International Law obligations of the successor State with regard to private property of private individuals, particularly land as to which the title had already been perfected before the conquest or annexation, are widely different from the obligations which arise in respect of personal rights under contracts. As regards the contractual obligations of the ceding State, it is for the new State to consider and decide which of them it is prepared to recognize and which others it will repudiate. The principles of international law as enunciated by various authorities do not insist on their wholesale recognition by the conquering or annexing State. In any case, legislation otherwise validly made and promulgated by the new State cannot be regarded as invalid or inoperative merely because it is not in accordance with or contravenes such supposed principles of international law, and no relief on that account can be granted by the municipal courts to persons adversely affected thereby. This contention of learned Counsel also must therefore fail.

" For the reasons stated above, our answer to the question referred to us is that the Company's profits earned in the calendar year of 1948 were assessable for the year 2006 (1949–1950) at the rates in force according to the Patiala Income Tax Act . . . and not in accordance with clause (23) of the agreement dated April 1, 1938, between the Company and the Ruler of the Jind State."

[Report: A.I.R., 1955, PEPSU 3.]

[[1] The Court here referred to the treatises by Oppenheim, Hyde, Huber and Hall.]

IV.—Succession with Regard to Obligations for Delinquencies (Torts)

State Succession—With regard to Obligations for Delinquencies—Compensation for Taking of Property—Succession of Governments—Liability for Acts of Local *de facto* Government—Liability of Occupied State for Acts of Occupant—Whether Yugoslavia Liable for Acts of Independent State of Croatia.

SOCONY VACUUM OIL COMPANY CLAIM.

United States, International Claims Commission.[1,2]

THE FACTS.—This was a claim for some $11,325,000 in respect of property in Yugoslavia owned by the Socony Vacuum Oil Company which, some time between 1941 and 1945, was taken by the Independent State of Croatia and damaged while under the control and administration of that State.

The Agreement of July 19, 1948, between the Governments of the United States of America and Yugoslavia regarding pecuniary claims of the United States and its nationals provided for the " full settlement and discharge of all claims of nationals of the United States against the Government of Yugoslavia on account of the nationalization and other taking by Yugoslavia of property . . . which occurred between September 1, 1939 and the date hereof " (Article 1).

The claimant Company contended that the post-war Government of Yugoslavia was liable for the acts of the Government of Croatia (a) as a successor Government thereto, (b) because, during part of the relevant time, the Government of Yugoslavia had *de facto* control over a large part of Yugoslavia (including Croatia), and (c) because the parties to the Agreement of 1948 intended it to cover takings by Croatia. The circumstances relating to the rise and functioning of the Independent State of Croatia during the Second World War are referred to in detail in the *Held*, below.

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[1] On July 19, 1948, the Governments of the United States of America and Yugoslavia concluded an Agreement for the " expeditious and equitable settlement " of claims of the United States and of its nationals against Yugoslavia on account of the nationalization and other taking by Yugoslavia of property and of rights and interests in and with respect to property, which occurred between September 1, 1939, and the date of the Agreement.

Article 1 (*c*) of the Agreement provided for the adjudication by an agency established by the United States of claims submitted thereunder. The International Claims Commission of the United States was established by the International Claims Settlement Act, 1949 (Public Law 455, 81st Cong., 2nd session (64 Stat. 12)). On August 21, 1948, the Government of Yugoslavia paid into the United States Treasury the sum of $17,000,000 in full settlement and discharge of all claims against Yugoslavia under the Agreement. (On July 1, 1954, the International Claims Commission was superseded by the Foreign Claims Commission of the United States.)

[2] The exact date of the decision does not appear from the Report as published in 1955. It would seem that the decisions of the Commission were given in the years 1951–1954.

Held: that the claim must be rejected. (a) The Government of Yugoslavia was not a successor to the Government of Croatia; (b) the fact that the Government of Yugoslavia had control over Yugoslav territory did not render it responsible for takings by Croatia; and (c) there was no evidence that those who negotiated the Agreement of 1948 had in mind takings by Croatia—on the contrary, Yugoslavia had treated takings by Croatia as war damage.

The Commission said: " Claimant contends that it can prove that the Independent State of Croatia, hereinafter referred to as Croatia, between 1941 and 1945 carried away, or used, part of its movable property and used or otherwise interfered with its immovable property and that losses and damage resulting from such acts are compensable under the Agreement of July 19, 1948, between the Governments of the United States and Yugoslavia. We are of the opinion that such losses and damages are not covered by the Agreement. As our decision of the question is of importance to all claimants, we will state our reasons for it at some length. In doing so, we will again direct our attention to the Agreement with Yugoslavia and the applicable principles of international law, justice and equity.

" The Agreement with Yugoslavia settled claims for the nationalization and other taking of property '*by Yugoslavia*' *between September 1, 1939 and July 19, 1948* (Article 1). As the alleged takings by Croatia occurred between 1941 and 1945 the time limitations of the Agreement are met. However, the contention of claimant that Croatia alone took property prior to 1945 and that the framers of the Agreement could, therefore, have had only such takings in mind when they fixed the time period as September 1, 1939, to July 19, 1948, is without foundation. It has been established in numerous claims before the Commission that the Yugoslav Government, Yugoslav military forces and so-called partisan forces, took property at various times during and prior to 1945.

" As indicated, the Agreement expressly covers takings ' by Yugoslavia '. Croatia is not named in the Agreement. Hence, the basic question for decision is whether the words ' by Yugoslavia ' mean or include ' by Croatia '. To decide this question we must look at the facts, including the historical background and legal characteristics and relationship of Croatia and Yugoslavia.

" On December 1, 1918, Yugoslavia was established as a constitutional hereditary monarchy with Peter I as King. He was succeeded by Alexander I who was assassinated on October 9, 1934. Peter II, son of Alexander I, then became King under a regency controlled by Prince Paul. This was the status of the Yugoslav Government when German and Italian aggression started.

" Soon after the commencement of World War II, Germany and Italy applied strong pressure to bring Yugoslavia into the Axis orbit and on March 20, 1941, the Yugoslav Cabinet agreed to cooperate with the ' new order '. Unrest followed and on March 27, 1941, Peter II took over the Government and Prince Paul left Yugoslavia.

" On April 6, 1941, German and Italian forces invaded Yugoslavia. On April 7, 1941, one Ante Pavelic, a Yugoslav political refugee who had been residing in Italy, broadcast an appeal to the Croats to secede from the Serbs and support Germany and Italy. Three days later German troops entered Zagreb and Slavko Kvaternik, another Croat leader, proclaimed an independent Croat state. On April 17 Pavelic assumed power, dissolved the old political parties and formed his own government with himself as its head. On the same day Yugoslav military forces surrendered to Germany and Italy. A few days before these events, Peter II had escaped with his cabinet. Subsequently he set up in London the Royal Yugoslav Government-in-Exile.

" The Axis and its European satellites and Japan and Spain promptly recognized the new state. Other nations, including the United States, did not do so but recognized the Royal Yugoslav Government-in-Exile as the legitimate Government of Yugoslavia. As to the position of the United States Government, Under-Secretary of State Sumner Welles declared on May 26 that he wished to ' reiterate the indignation of the Government of the American people at the invasion and mutilation of Yugoslavia by various members of the Tripartite Pact '.

" On May 14 the Croat Cabinet of Ministers issued a decree establishing a Kingdom of Croatia. The King of Italy designated his nephew as King. However, the new King never left Italy or assumed power in Croatia. From May 14, 1941, until Italy's surrender in September 1943, Italy actively participated in the affairs of Croatia although its civil administration was carried out primarily by Croatians. From September 1943 until May 7, 1945, Germany actively participated in Croatian affairs. On the latter date Pavelic fled with the retreating German forces and Croatia ceased to exist as an ' independent state '.

" During 1944 a large part of Yugoslavia, including a substantial part of Croatia, had been wrested from foreign occupation or control by Yugoslav forces. Such forces were recognized by the Yugoslav Government-in-Exile as having *de facto* control of a large part of Yugoslavia and on November 1, 1944, it made an agreement with such forces for the reestablishment in Yugoslavia of a Yugoslav Government. That agreement provided in part as follows:

> ' Recognizing the principle of the state continuity of Yugoslavia from the viewpoint of international law and from the clearly expressed desire of all people of Yugoslavia in their 4-year struggle for a new, democratic, independent, and federative state built according to democratic principles, we wish to endeavor to fulfill the people's desire in every respect and especially regarding the internal organization of the state and the form of government and, therefore, we wish to

> maintain the basic and the general principles of a constitution which is shared by all real democratic states.
>
> 'Yugoslavia, having been recognized among the United Nations, in its old form and being in function as such, we shall represent our country in the foreign relations of the world and in all its actions of foreign policy as before, until our state, the future Democratic Federative Yugoslavia, obtains its definite form of government by a free determination of the people.'

Thereafter, Peter II agreed to the formation of a regency and a coalition cabinet of 28 ministers was established in Belgrade in March 1945, 6 members of which were from the Government-in-Exile. On November 11 elections were held for a constituent assembly. Convening on November 29, 1945, the new assembly abolished the monarchy and set up the Federal People's Republic of Yugoslavia. A constitution was adopted on January 31, 1946 and Marshal Tito became Prime Minister.

"Of all the states of Europe, Yugoslavia was the most dismembered during the war. Germany and Italy divided Slovenia between them. Italy annexed part of Dalmatia and all of the islands in the Adriatic and set up a protectorate in Montenegro. Albania annexed the Kossovo District and Western Macedonia. Bulgaria annexed that part of Macedonia which was not annexed by Albania. Hungary annexed Western Vojvodina and some districts on the Croatian border. Serbia was placed under German military occupation. Eastern Vojvodina was under separate military occupation with the German minority taking part in its affairs. Croatia, Bosnia, Hercegovina and a small part of Dalmatia became the Independent State of Croatia.

"Croatia embraced approximately one-third of the total area of Yugoslavia and approximately one-third of its population. At all times during the period of its existence as a so-called independent state, forces headed by Mihalovic and Tito conducted organized resistance within it. At no time during its 4-year life was Croatia's control of its territory and population complete. It was created by German and Italian forces and was maintained by force and the threat of force and as soon as the threat subsided Croatia ceased to exist.

"The aggression of Germany and Italy followed three patterns: international war (e.g., France), force (e.g., Yugoslavia) and the threat of force (e.g. Austria). They accomplished and maintained effective control over the conquered state, or territory, by military occupation (e.g., France), annexation (e.g., Austria), union (e.g., Albania), establishment of a protectorate (e.g., Bohemia-Moravia), establishment of a puppet government (e.g., Norway), or establishment of a puppet state. Slovakia and Croatia were established as puppet states.[1]

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[1] The foregoing data has been taken from: *Encyclopedia Britannica*; Lemkin, *Axis Rule in Occupied Europe*; Langer, *Seizure of Territory*, and the Commission's own records.

"The Allies, including the United States and the Yugoslav Government-in-Exile, by a declaration dated January 5, 1943 declared invalid:

> '. . . any transfers of or dealing with property, rights and interests of any description whatsoever which are, or have been situated in the territories which have come under the occupation or control, direct or indirect, of the governments with which they are at war, or which belong, or have belonged, to persons, including juridical persons, resident in such territories.' (Langer, *Seizure of Territory*, p. 109.)

"After the reestablishment of the Yugoslav Government in Yugoslavia it repealed and voided all legal provisions 'enacted by the occupiers and their helpers' by decree of February 3, 1945 (Official Gazette No. 4, February 11, 1945), and ordered all property taken during the occupation from persons, including legal entities, returned to the owners immediately. (Law of May 24, 1945, Official Gazette No. 36, May 26, 1945.)

"From the matters recited above, it appears well established that the Kingdom of Croatia was created by German and Italian forces and threat of force; that during its entire 4-year life it was subject to the will of Germany or Italy, or both, in varying degrees, except as to civil administration matters; and that it ceased to exist upon the retreat of the German forces. We are also of the view that the Yugoslav Government-in-Exile was the legitimate government of Yugoslavia until it was succeeded by the present government which is now the legitimate government of Yugoslavia. On the basis of simple facts, as they emerge from proven historical events of recent existence, Yugoslavia and Croatia may not be viewed as the same entity and the words 'taking by Yugoslavia', if given their ordinary meaning, may not reasonably be construed to embrace 'taking by Croatia'.

"We also believe it to be clear that the taking of claimant's property by Croatia was invalid both by express declaration by the Government of Yugoslavia and accepted legal principles (*Williams* v. *Bruffy* (1877), 96 U. S. 176, 185–186).

"The Kingdom of Croatia came into being as a creation of the war. It was unwanted by, and never became a part of, the permanent Government of Yugoslavia. It was not established through any dereliction on the part of the Government of Yugoslavia and that government had no control over the acts of Croatia. It further seems clear that neither the Government of Yugoslavia nor its peoples received benefits from the takings alleged by claimant. We are persuaded that the present Government of Yugoslavia has not been impressed with international responsibility for 'takings by Croatia' and, as a result, there is no reason for treating the words 'by Yugoslavia' and 'by Croatia' as synonymous. Neither do we believe that there is basis for believing that the negotiators of the

Agreement intended to settle claims for takings by Croatia of the sort for which compensation is sought by claimant.

" Croatia is defined by contemporary writers as a ' puppet state ' or ' puppet government ', terms which appear to be of comparatively recent adoption in the field of international law. We have found no decisions of international arbitral tribunals which have decided whether a ' parent ' state is responsible for takings of property by a ' puppet state ' or ' puppet government ' which was established and maintained within its borders while a war was in progress and claimant has brought none to our attention. However, it seems clear that the writers to whom we have alluded, and who apparently had a part in the adoption of those expressions, would absolve Yugoslavia from all responsibility for takings by Croatia for the reasons heretofore given. See Lemkin, *Axis Rule in Occupied Europe*, page 11; Feilchenfeld, *The International Economic Law of Belligerent Occupation*, pages 7–8; Langer, *Seizure of Territory*, page 102; Wormser, *Collection of International War Damage Claims*, pages 1, 2, 3; and Sereni, *Political Science Review*, vol. XXXV, December 1941, No. 6, pages 1146, 1150.

" We need not, however, rely upon contemporary expressions with respect to the non-liability of parent states for acts of ' puppet states ' because Croatia had all of the characteristics of a ' local *de facto* government ' or a ' government of paramount force ', terms which have well defined meanings and concerning which there are abundant precedents. John Bassett Moore distinguishes between general *de facto* governments and local *de facto* governments and states the rule with respect to the non-liability of the latter in the following language:

> ' [*De facto* governments] are of two kinds. One of them is such as exists after it has expelled the regularly constituted authorities from the seats of power and the public offices and established its own functionaries in their place, so as to represent in fact the sovereignty of the nation. . . . The other kind of *de facto* governments . . . is such as exists where a portion of the inhabitants of a country have separated themselves from the parent state and established an independent government. The validity of its acts, both against the parent state and its citizens or subjects, depends entirely upon its ultimate success. If it fails to establish itself permanently, all such acts perish with it. If it succeeds, and becomes recognized, its acts from the commencement of its existence are upheld as those of an independent nation.'

Such was the case of the State governments under the old confederation on their separation from the British Crown. Having made good their declaration of independence, everything they did from that date was as valid as if their independence had been at once acknowledged. Confiscations, therefore, of enemy property made by them were sustained as if made by an independent nation. But if they had failed in securing their independence and the authority of the King had been reestablished in this country, no one would contend that their acts against him, or his loyal subjects, could have been upheld as resting upon any legal foundation.

" No case has been cited in argument, and we think none can be found, in which the acts of a portion of a state unsuccessfully attempting to establish a separate revolutionary government have been sustained as a matter of legal right. As justly observed by the late Chief Justice in *Shortridge & Co.* v. *Macon*, decided in the circuit, and, in all material respects, like the one at bar,

> ' Those who engage in rebellion must consider the consequences. If they succeed, rebellion becomes revolution, and the new government will justify its founders. If they fail, all their acts hostile to the rightful government are violations of law, and originate no rights which can be recognized by the courts of the nation whose authority and existence have been alike assailed. Chase's Decisions, 136; *Williams* v. *Bruffy* (1877), 96 U.S. 176, 185–186.' (Moore, *International Law Digest*, pp. 44–45.)[1]

See Borchard, *Diplomatic Protection of Citizens Abroad*, pages 206–209; *Case of the Alleghanian*, Moore, *International Arbitrations*, pages 1621 ff.; Decisions of Mixed Commission, Treaty of May 8, 1871 between the United States and Great Britain, reported in Moore, *International Arbitrations*, I, 684, 695, III 2900 ff.; Decisions of Mixed Commission, Treaty of April 4, 1868 between the United States and Mexico, reported in Moore, *International Arbitrations*, III, 2982–2987, 2886–2900, 2873–2886, 2902–2938; comment and report on a decision of Mixed Commission, Treaty of April 4, 1831 between the United States and France, Moore, *International Law Digest*, I, page 252. The latter decision is of special interest because the Commission held France responsible for takings by the Dutch Government while the latter was under the domination of France.

" A ' puppet state ' or local *de facto* government such as Croatia also possesses characteristics of ' unsuccessful revolutionists ' and ' belligerent occupants '. It is also settled that a state has no international legal responsibility to compensate for damage to or confiscation of property by either. There are, of course, exceptions to the general rule, as for example where there is fault or lack of diligence on the part of the state in the suppression of the revolution. There are also exceptions which apply to ordinary civil administrative acts which must be carried out by the revolutionists in the administration of the occupied territory. Eagleton, *The Responsibility of States in International Law*, page 146; Hyde, *International*

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[1] A local *de facto* government can, of course, perform valid acts pertaining to the civil administration of the occupied territory such as the collection of taxes, seize property belonging to the state, receive money owed the state, etc. Borchard, *Diplomatic Protection of Citizens Abroad*, pp. 207–209; Moore, *International Law Digest*, I, pp. 45 ff. But as we are concerned here only with invalid acts, such as the use of and damage to foreign owned property, a discussion of valid acts does not appear to be indicated.

Law, volume 1, page 299; Borchard, *The Diplomatic Protection of Citizens Abroad*, pages 228–241; *Hopkins* v. *The United Mexican States*, Claims Commission, United States and Mexico, Convention of September 8, 1923, Opinions of Commissioners, page 42 [*Annual Digest*, 1925–1926, Case No. 170]. None of the exceptions to the rule are present here. Hence, such losses, like international war damage, must be borne by the owner of the property.

" Almost all nations have agreed to be bound by the Hague Regulations, 1907, codifying the rights and obligations of ' belligerent occupants ' (Arts. 42–56). See Feilchenfeld, *The International Economic Law of Belligerent Occupation*, page 5; Borchard, *The Diplomatic Protection of Citizens Abroad*, pages 262–267. Under these regulations a ' belligerent occupant ' may be and usually is held responsible for the taking of private property at the treaty table. Since the regulations impose responsibility upon the belligerent occupant for takings it is, of course, obvious that the occupied state is excused. Consequently, in the absence of treaty or other arrangement with the belligerent occupant the private party who has sustained loss or damage is left without redress.

" In the light of these generally accepted principles of international law we find no basis for holding that Yugoslavia is impressed with responsibility for takings by Croatia, of the sort involved herein, and therefore, that the Agreement of July 19, 1948, includes such takings or that either side intended that it should do so.

" We believe that the foregoing disposes of the question presented. We will, however, comment briefly on several of the arguments advanced by claimant.

" Claimant contends that the present Government of Yugoslavia is a ' successor ' to the Government of Croatia and as such is liable for the acts of its predecessor government under the familiar and generally accepted principle of international law that successor governments are liable for the acts of their predecessors, such as the taking of property of foreign nationals. We are in complete agreement with claimant's position as to the liability of successor governments but find no basis for application of the principle to the instant question because we are of the opinion, for the reasons heretofore given, that the Government of Yugoslavia is not factually or legally a successor to the Government of Croatia.

" Claimant also contends that the present Government of Yugoslavia is liable for takings by Croatia because it could perform certain legal acts by virtue of its *de facto* control over territory and because private parties could perform valid acts during its control. We are in complete agreement with its position on this matter but find no basis therefrom for holding that Yugoslavia is responsible for takings by Croatia. The subjects are not, in our view, related. . . .

" For the foregoing reasons we hold that the taking of property by the Independent State of Croatia, and damage to property while under its control and administration, are not compensable under the Agreement between the Governments of the United States and Yugoslavia."

[Report: *Settlement of Claims*, 1949–1955, p. 77.]

NOTE.—See also the *Popp Claim* (*ibid.*, p. 76), based on the taking of the claimant's motor car by the Government of Croatia in 1944. It was *held* that the claim must be rejected, seeing that the Government of Croatia was not a "predecessor Government" of the post-war Government of Yugoslavia. The Commission said: "This claim raises the question whether a taking of property by the Government of Croatia in 1944 is a taking by the Government of Yugoslavia within the terms of Article 1 of the Yugoslav Claims Agreement of 1948, and whether the State of Croatia was a predecessor Yugolsav Governent for whose actions the present Yugoslav Government is liable. It is unnecessary to go into the historical details of the creation of Croatia in April 1941 following the invasion of Yugoslavia by Germany. It is sufficient to say that the Croat regime then established was a mere puppet state created out of the territory of Yugoslavia, occupied in the course of military operations against Yugoslavia, and under subservience to the Axis Powers. Under recognized tenets of international law the State of Croatia cannot be held to be a predecessor government of the present Yugoslav Government. And further, the present Yugoslav Government is not liable for the actions of the Croatian Government. We therefore conclude that this claim is not within the provisions of Article 1 of the Yugoslav Claims Agreement of 1948."

And see the *Versic Claim* (*ibid.*, p. 58), which was for personal injuries suffered by the claimant "as a result of his ill treatment and confinement in the Camp of Jasenovac". The Commission said: "It appears that claimant was taken into custody in June 1941 by the then Croatian Government. This Commission has held in its Decision No. 488 . . . [see the *Popp Claim, supra*] that the present Yugoslav Government is in no way liable for the actions of the Kingdom of Croatia, for the reason that Croatia was but a puppet state and not a predecessor government of the present Yugoslav Government. In the absence of proof that any property of the claimant has been nationalized or otherwise taken by the Yugoslav Government, the claim is denied in whole."

V.—Respect for Private Rights

State Succession—Effect on Private Rights—Currency of Successor State—Transfer of Sovereignty from Former Dutch East Indies to Indonesia.

VAN MAREN *v.* EERSTE NEDERLANDSE VERZEKERING MAATSCHAPPIJ.

Holland, District Court of The Hague. January 2, 1952.

Court of Appeal of The Hague. May 28, 1953.

Supreme Court. February 19, 1954.

THE FACTS.—The plaintiff took out a life assurance policy with the defendant Company for a sum expressed in Netherlands Indies currency. The policy was issued in the former Netherlands Indies and fell due on October 1, 1950, a year before the new Indonesian Monetary Law came into operation on October 3, 1951. The issue before the Court was that of the currency in which the policies were payable in Holland.

Held (by all three Courts): that the policy monies were payable in Holland in Netherlands guilders.

The District Court said: " Since sovereignty over the Netherlands Indies has been transferred to the Republic of (the United States of) Indonesia and the currency in which the amount insured was expressed has ceased to exist, having been replaced in Indonesia by the Indonesian guilder or rupiah, the Court must examine to what amount the plaintiff is now entitled. On a reasonable interpretation of the contract, which was entered into by Dutch parties, the Netherlands Indies guilder must be regarded as on a par with the Netherlands guilder as merely a local variant, formerly of virtually equivalent value, of one and the same monetary unit of the Kingdom of the Netherlands. Since the original currency mentioned in the insurance policy has ceased to exist, the amount insured must now be paid out in Holland in Netherlands guilders."

[Reports: *N.J.*, 1952, No. 109; *ibid.*, 1953, No. 480.]

See, for other cases in the same sense, *Boonekamp* v. *Vredenburgh*, decided by the District Court of Haarlem on May 29, 1951 (Report: *N.J.*, 1952, No. 300), where it was *held* that a loan in Netherlands Indies guilders contracted in 1941 had to be reimbursed in Netherlands guilders; and *Kuilman* v. *ten Haage*, decided by the District Court of Leeuwarden on June 26, 1952 (Report: *N.J.*, 1953, No. 503), concerning the balance of a debt incurred for the purchase of a medical practice in Indonesia.

See, on the other hand, *Heinemann* v. *Senembah Company* (*International Law Reports*, 1953, p. 81).

State Succession—Respect for Private Rights—Exemption from Payment of Rates—Whether Binding upon Successor State—Formation of Union of Princely States in India—Enforcement of Rights in Court of New Sovereign—Implied Recognition by New Sovereign of Rights Granted by Previous Sovereign.

MIHAN SINGH *v.* THE SUB-DIVISIONAL CANAL OFFICER.

India, High Court of Patiala and East Punjab States Union.

(Mehar Singh J.)

May 3, 1954.

THE FACTS.—Before the independence of India, the Ruler of Nabha State by order made a grant of irrigation water in perpetuity without payment of water rates to S. Bishan Singh, the father of the petitioner. In 1948 the Nabha State became an integral part of the newly-created Patiala and East Punjab States Union (PEPSU), which formed part of the Dominion of India. There had been no disturbance in the enjoyment of the grant by the petitioner (who meanwhile had succeeded to his father) until in 1952 a demand for payment of water rates was made against him. The petitioner applied for a writ of *certiorari* against the respondent (the Canal Officer) quashing the orders made by him in respect of water rates. The respondent replied that " the grant upon which the petitioner places reliance was only for the lifetime of S. Bishan Singh; that if that grant amounts to a personal law in favour of S. Bishan Singh then that law has been repealed by s. 3 (1) of the Patiala and East Punjab States Union General Provisions (Administration) Ordinance, 2005 [A.D. 1948] . . .; and that in any case after the formation of the PEPSU State the sovereignty of the former Nabha State was surrendered to the new State and so any rights that the petitioner had against the former Sovereign cannot be enforced by him in the courts of the new Sovereign ".

Held: that the respondent was prohibited from demanding payment of water rates by the petitioner.

The Court said: " There is no doubt that the . . . order . . . was a personal law in favour of S. Bishan Singh and his successors.

" It is clear that sub-section (1) of s. 3 of the Patiala and East Punjab States Union General Provisions (Administration) Ordinance 2005 . . . does not abrogate the personal law made by the Ruler of the former Nabha State in favour of S. Bishan Singh and his successors. Therefore, the contention on behalf of the respondent that the personal law of the petitioner has been repealed or abrogated by s. 3 (1) of the Ordinance . . . is untenable.

" The last contention on behalf of the respondent is that when the Rulers of the former Covenanting States pooled their sovereignties and created a new Sovereign in the Pepsu State, they surrendered their sovereignty to the new State and ceded their territories to that State. On such surrender of sovereignty and cession of territory to the new Sovereign and the new State, the rights of a subject of a former Covenanting State against that State cannot be enforced by the subject in the Courts of the new Sovereign without recognition of those rights by the new Sovereign.[1]

" It is not denied that there is no such recognition, by legislation of the new Sovereign in the Pepsu State, of the rights of the petitioner under the . . . Order of the Ruler of the former Nabha State. Again, there is no express agreement between the petitioner and the new Sovereign recognizing those rights. The question is whether, by implication, an agreement can be read into the conduct of the parties whereby recognition of those rights has taken place.

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[1] The Court relied on the decisions of the Privy Council in *Hoani Te Heuheu Tukino* v. *Aotea District Maori Land Board*, A.I.R., 1941, P.C. 109 (B), *Annual Digest*, 1938–1940, Case No. 184, and in *Asrar Ahmed* v. *Durgah Committee, Ajmer*, A.I.R., 1947, PC 1 (C), *Annual Digest*, 1946, Case No. 17.

" The only factor which weighs in favour of the petitioner in this connection is the silence of the officers of the new Sovereign in not demanding payment of water rates by the petitioner . . . until July 5, 1952. There is no other factor from which such an implied agreement between the petitioner and the new Sovereign can be derived, except the consideration that Ordinance . . ., 2005 [A.D. 1948] has not repealed the personal law in this behalf in favour of the petitioner. If it was the intention of the new Sovereign to abrogate the rights of the petitioner, it was open to the new sovereign expressly to repeal the personal law in favour of the petitioner.

" The general legislation of the former Covenanting States ceased to have effect, but not the personal laws relating to the rights, privileges and property of private individuals. This, coupled with the fact that the new Sovereign or the officers of the Sovereign did not move to demand payment of water rates from the petitioner for nearly four years after the formation of the new State, is an indication of the implication that the new sovereign accepted the position as it was as regards the rights of the petitioner."

[Report: A.I.R., 1955, PEPSU 20.]

NOTE.—The Court did not emphasize the special character of the grant of exemption from taxation (water rates), which belongs to the domain of public law and as such does not pass to the new Sovereign without his confirmation—unlike the case of private rights, which bind the new Sovereign automatically on the cession of territory unless repealed by him.

VII.—International Conventions

State Succession—Succession to Treaties—Treaty of Extradition —Succession of Yugoslavia to Treaty Concluded between United States and Serbia—Extradition only if Provided by Treaty—The Law of the United States of America.

IVANEVIC *v.* ARTUKOVIC; WARE *v.* ARTUKOVIC.

United States, District Court, Southern District, California.

(*sub nom. Artukovic* v. *Boyle*).

July 14, 1952.

Court of Appeals, Ninth Circuit. February 19, 1954.

THE FACTS.—The petitioner, one Artukovic, was arrested in the City of Los Angeles on August 29, 1951, pursuant to a warrant of arrest issued upon a complaint filed by the Consul-General of the Federal People's Republic of Yugoslavia. The complaint alleged that the petitioner had murdered and caused to be murdered several persons named in the complaint. Extradition was sought under a

Treaty of Extradition between the United States and Serbia, signed at Belgrade on October 25, 1901 (32 Stat. 1890). Artukovic petitioned the United States District Court for the issue of a writ of habeas corpus on the ground that the charge against him was of a political nature and therefore not an extraditable offence, and that no treaty of extradition existed between the United States and Yugoslavia.

Held (by the District Court): that the petitioner should be released on bail. The Treaty between the United States and Serbia of 1902 was not then in force between the United States and Yugoslavia. The Serb-Croat-Slovene State, which subsequently became known as the Federal People's Republic of Yugoslavia, was a new State and did not succeed to treaties concluded by Serbia. The question whether or not a treaty exists is not a matter which lies exclusively within the province of the Executive Department, but is a judicial question to be decided by the courts. [Report: 107 F. Supp. 11.]

The Consul-General and the United States Marshal appealed. The United States filed a brief as *amicus curiae* on the ground that

> " The Executive Branch of the Government has proceeded heretofore on the theory that, in the absence of the complete absorption of one of the high contracting parties to the treaty by a third country, a mere change in the form of government or the expansion or contraction of the geographical boundaries of that high contracting party did not affect (*sic*) the termination of the treaty relations with that party. . . . A departure from the established practice after this late date could cause great confusion. . . . Heretofore the Department of State has been looked to for a determination of the question whether a specific treaty is still in effect after such changes in government or boundaries."

Held (by the Court of Appeals): that the decision of the Court below must be reversed and the cause remanded. The practice of States in continuing to give recognition to treaties between them weighs very heavily in determining whether treaty relations exist. Whether or not Yugoslavia was a new country, it succeeded to the international rights and obligations of Serbia, and the Treaty of 1902 therefore constituted a valid and effective treaty between the United States and Serbia.

The Court said: " We start with the admitted fact that extradition from the United States to a foreign country may be accomplished ' only during the existence of any treaty of extradition with such foreign government.' Title 18 U.S.C.A. § 3181. See, also, *Factor* v. *Laubenheimer*, 1933, 290 U.S. 276, 287, 54 S.Ct. 191, 78 L.Ed. 315.

" All parties agree that the ' Kingdom of the Serbs, Croats and Slovenes ' changed its governmental structure somewhat and its official title to ' Kingdom of Yugoslavia ' in 1928, and thereafter to the ' Federal Peoples' Republic of Yugoslavia ' in 1945, and that these changes were internal and political changes and did not affect the validity of any treaty which was effective under the government of '*Kingdom of the Serbs, Croats and Slovenes*'.[1] Therefore, if the treaty between the United States and Serbia survived as an effective treaty between the United States and the Kingdom of the Serbs, Croats and Slovenes, it survived as an effective treaty between the United States and the Federal Peoples' Republic of Yugoslavia, and is effective in the extradition proceedings pending before the United States Commissioner.

"After an exhaustive hearing and consideration of authorities and official documents, the district court found that there was no treaty of extradition in existence between the demanding nation and the United States, and that there never has been. It was freely admitted by all parties that such a treaty had existed between the United States and Serbia dated May 17, 1902, but Artukovic claims that when, in 1918, several principalities or nations, inclusive of the Kingdom of Serbia and the Kingdom of Montenegro, combined under the name of the 'Kingdom of the Serbs, Croats and Slovenes', a new nation was born which had no carry-over political relations to any of the old governments; and that, therefore, the United States-Serbian Extradition Treaty of 1902 which the demanding government and the United States Marshal claim is in effect between the United States and Yugoslavia, has no validity. On the other hand, the United States Marshal and Consul General of Yugoslavia, as well as the United States by its Amicus Curiae brief, assert that the sovereignty of Serbia, as that country existed upon the date of the United States-Serbian Extradition Treaty of 1902, has continued to exist uninterruptedly and that the combination of countries under the name of 'Kingdom of the Serbs, Croats, and Slovenes' was not and is not an entirely new nation but the same country under the change of official title, and is a continuation of the Serbia of 1902 as a Greater Serbia.

"The historic events which lead to the different views we have just set out are not in issue. Whether these events support one or the other of such views is the issue. Since these events are proved by agreement as to fact and by official and authoritative documents, we are in as favourable a position to decide the issue as was the district court.

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[1] The Rights of War and Peace, Hugo Grotius, 1625, Translation from the Latin by Rev. A. L. Campbell, 1814, Vol. I, pages 336, 338, and Vol. II, Book II, Ch. XVI, speaking on "The Interpretation of Treaties", Grotius said: ". . . although a republic be changed into a regal government, a treaty will remain in force; for the political body continues the same, although the head be changed, and the sovereign power, which before was diffused among many members, is now centered in one."

See, also: International Law, Chiefly as Interpreted and Applied by the United States, Charles C. Hyde, 1945, page 1528; Digest of International Law, Hackworth, 1940, Vol. V, § 511; Research in International Law, Harvard Law School, 1935 Draft Convention on the Law of Treaties, Article 24; A Digest of International Law, John Bassett Moore, 1906, § 78.

" The sovereign nation of the Federal Peoples' Republic of Yugoslavia is the combination of the independent sovereign states of the Kingdom of Serbia and of Montenegro and the Serbian, Croatian and Slovene provinces formerly under the government of the Empire of Austria-Hungary. We have reproduced the portion of appellant's (Ivancevic's) opening brief which names and gives a limited political and ethnic reference to each. [Footnote omitted.] We have concluded that the factual statements therein are accurate insofar as they touch the issues of this case.

" The first title assumed by the combination of countries was the ' Kingdom of the Serbs, Croats and Slovenes ', which was subsequently changed by internal politics to the ' Kingdom of Yugoslavia ', and later to the ' Federal Peoples' Republic of Yugoslavia '. The people of each of these combining countries are preponderantly of Yugoslavic or South Slavic blood and throughout a very, very long period of time they have been keenly conscious of their interrelation and have harbored an unabated ambition to live as a part of a United Yugoslav state. The upheaval in Europe, owing to the First World War, shook several Slav provinces from the old Monarchy of Austria-Hungary and, some time before, other Slav-peopled portions of Turkey had been separated from that country. The opportunity for unity of the South Slavs was embraced and finally accomplished. Serbia, an area of Central Europe peopled by Slavs in the great majority, achieved complete independence in 1878 and was an important going state before and during World War I, with international recognition and official representation in the capitals of the world. Montenegro was a small though independent nation. The other units in the combination, though not full fledged nations, were at the time of the combination free from domination by neighbor countries.

" We recite here certain historic facts which, are we think, critical to the issue.

" On December 7, 1914, Serbia promulgated a statement in which it characterized its part in World War I as,

> ' . . . a struggle for the liberation and unification of all our unliberated brethren, Serbs, Croats and Slovenes . . . .'[1]

" On May 6, 1915, The Yugoslav Committee in London, composed of Yugoslav refugees, announced that,

> ' . . . the struggle of Serbia and Montenegro is not a struggle of conquest to expand their borders; these two Serbian states are protagonists in the liberation of all Yugoslavs and their task is the task of all of us.'[2]

" On July 20, 1917, a Committee of Yugoslavs and representatives of the Serbian government announced from the Island of Corfu affirmation of their principles as,

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[1] F. Sisic, Documents on the Creation of the Kingdom of the Serbs, Croats and Slovenes (Zagreb, 1920) p. 10.

[2] *Ibid*, p. 25.

> ' . . . the only and inalienable demand of our people . . . the basis of the principle of free self-determination of peoples, to be liberated from all foreign enslavement and united in one free, national and independent state.'[1]

A few days later, the ' Montenegrin Committee for National Unification ' announced its acceptance of the Corfu Declaration.

" On October 6, 1918, the ' National Council of Slovenes, Croats and Serbs ' was organized as ' . . . the political body representing all Slovenes, Croats and Serbs . . . '.[2]

" Shortly afterward, Serbia recognized the National Council as the lawful government of the Serbs, Croats and Slovenes, and on November 24, 1918, the National Council resolved to

> ' . . . proclaim the unification of the State of the Slovenes, Croats and Serbs . . . with the Kingdom of Serbia and Montenegro into a unified State of Serbs, Croats and Slovenes . . .,[3]

and Montenegro agreed a few days later. Many events of importance to the issue occurred between the dates we have specified, all of them trending toward the same end. The culmination seems well illustrated by the exchange of official communications from the Serbian government to the United States Secretary of State and the Secretary's reply thereto.[4]

" In 1921, United States Secretary of State Hughes, in answer to a United States citizen, wrote:

> ' . . . No formal understanding has been reached with the Government of the Kingdom of the Serbs, Croats and Slovenes as to the application of these agreements to the territory of that country which formerly belonged to the Austro-Hungarian Empire. It is the opinion of the Department that the treaties may properly be regarded as applicable to that territory.'[5]

The trial court discounts the weight of this opinion because it was given in the form of private communication in a non-adversary proceeding. Yet it must be pointed out that the communication in question was not private communication, but an official one of the Secretary of State, as such, with respect to a matter peculiarly within his official charge. And but a short time thereafter, Secretary of State Hughes received a communication from the Yugoslav Chargé d'Affaires on September 29, 1921, as follows:

> ' . . . The Government of the Kingdom of the Serbs, Croats and Slovenes considers the treaties and conventions concluded between the

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[1] *Ibid.*, p. 100.

[2] *Ibid.*, p. 174.

[3] *Ibid.*, pp. 255, 256.

[4] Foreign Relations of the United States, 1919, Vol. II, publication No. 661, Department of State, Government Printing Office, 1934. [Quotation omitted.]

[5] Secretary Hughes to Defrees, Buckingham and Eaton, June 4, 1921, MS. Department of State, file 711.60H/1; Digest of International Law, Hackworth, Vol. V, p. 375.

> Kingdom of Serbia and the United States as applicable to the whole territory of the Kingdom of the Serbs, Croats and Slovenes as constituted at the present.'[1]

" Thereafter, the Department, in reply to inquiries, stated that the treaties with Serbia were in force and applicable to the new Kingdom, including territory not part of Serbia before the World War of 1914–18.[2]

" Hyde, in his International Law, Chiefly as Interpreted and Applied by the United States, Vol. 2, page 1535, says:

> ' It was logical and natural that the Government of the Kingdom of the Serbs, Croats and Slovenes, should have acknowledged to that of the United States in 1921, that it considered the treaties and conventions concluded between the Kingdom of Serbia and the United States as applicable to the whole territory of the Kingdom of the Serbs, Croats and Slovenes, as then constituted. The latter Kingdom embodied, in a territorial sense, the enlargement of the former Kingdom, and was the same State with a bigger body. It was also reasonable to contend, as did the United States in substance in 1921, that that Kingdom should regard those agreements as applicable to its territory which had formerly belonged to the Austro-Hungarian Empire. . . . .'

" Hackworth in ' Digest of International Law ', Vol. V, page 375, makes the following statement:

> ' It is conceded that the present Kingdom of Yugoslavia has replaced and absorbed the Kingdom of Serbia, and that the convention above referred to [Convention of Commerce and Navigation of October 14, 1881, 2 Treaties, etc. (Malloy, 1910) 1613] is now in full force and effect between Yugoslavia and the United States ', citing *Lukich* v. *Department of Labor and Industries*, 1934, 176 Wash. 221, 223, 29 P.2d 388, 389; *Urbus* v. *State Compensation Com'r*, 1933 113 W. Va. 563, 169 S.E. 164.

" That Serbia was the nucleus around and to which the other countries would and did adhere in a united nation is further supported by the proclamation of Prince Regent Alexander of Yugoslavia, Christmas 1919, in which he felicitated the people of his country upon the culmination of Slav unity in government. We quote from the proclamation . . .[3]

" The uncontrovertible fact before us is that a national union of the South Slav peoples was effected with Serbia as the nucleus. Serbia took an active part in the transitions which we have sketched;

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[1] The Chargé d'Affaires ad interim of the Kingdom of the Serbs, Croats, and Slovenes to Secretary Hughes, September 29, 1921, MS. Department of State, file 711.60H/3; Digest of International Law, Hackworth, Vol. V, pp. 374–5.

[2] The Under Secretary of State (Phillips) to Mr. Unkovich, November 5, 1923, MS. Department of State, file 711.60H/5; the Assistant Secretary of State (Castle) to Messrs. Nelson and McFall, September 28, 1927, MS. Department of State, file 711.60H/7; Digest of International Law, Hackworth, Vol. V, page. 375.

[3] Christmas Day Proclamation of Prince Regent Alexander of Yugoslavia (acting for his father, the King): [Quotation omitted.] Foreign Relations of the United States, 1919, Vol. II, page 896.

the King of Serbia continued as King of the union; Belgrade remained as the capital; the rights guaranteed by the Serbian Constitution were proclaimed as the rights of every person within the union; the foreign legations and war missions of the Kingdom of Serbia were authorized to act for the union. Both the United States and Yugoslavia acted and have continued to act in accord with the theory that the entity as it existed after the union was the political successor of the original Serbia with international political compacts continuing.

"It does not appear that either the United States or Yugoslavia has ever before requested extradition from the other country, and this might be considered significant. However, in view of what we have already said, we think all possible significance on that score has disappeared. There is another reason, however, why it certainly is of no moment.

"In 1882, the United States and Serbia negotiated a Treaty of Commerce and Navigation, 22 Stat. 963,[1] and also a Consular Treaty, 22 Stat. 968.[2] Those treaties have continuously been adhered to and recognized by both governments. The reasons for their continuing validity apply equally to the Treaty of Extradition.

"Difference of opinion exists as to whether the combined country was *new*, or a continuance of Serbia.[3]

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[1] Treaties, Conventions, International Acts, Protocols, and Agreements between the United States of America and other Powers, as compiled by William M. Malloy, Vol. 2, page 1613.

[2] *Ibid.*, page 1618.

[3] Authority for the contention that the Kingdom of the Serbs, Croats and Slovenes, i. e., Yugoslavia, is a "new state lacking continuity with Serbia" which is considered an extinguished state, follow: Guggenheim, Beitraege zur Voelkerrecht Leichen Lehre vom Staatenwechsel, 1925; Kaufman, Niemeyers Zeitschrift fuer Internationales Recht, in Chap. XXXI, pp. 211–251; Udina, L'estinizione dell' Impero Austro-Ungarico nel Diritto Internationale, 2d ed., pp. 288, 303. See, also, the lectures of Peritch on "Droit International Yougoslave" given at the Hague Academy of International Law in 1928 (28 Recueil des Cours, p. 390ff).

Authority for the contention that Yugoslavia is a continuation of Serbia follows: Hyde International Law, Vol. 2, p. 1535; M. Yovanovitch Le Droit Constitutionnel du Royaume des Serbes, Croates et Slovenes (1924) p. 12ff; Research in International Law, Harvard Law School, 1935, 1058–9; Hackworth, International Law, Vol. V, p. 375.

See, also: *Lukich* v. *Department of Labor and Industries*, 1934, 176 Wash. 221 223; 29 P.2d 388, 389 [*Annual Digest*, 1933–1934, Case No. 200]; *Urbus* v. *State Compensation Com'r*, 1933, 113 W.Va. 563, 169 S.E. 164.

McNair, in his "The Law of Treaties", 1938, at page 443, said as to the Serbs, Croats, and Slovenes state:

"There seems to be no doubt that this case must be regarded as enlargement of the territory of an existing state."

The United States, in its Amicus Curiae brief filed in the instant appeal, succinctly sums the facts as follows, at page 16:

"At the time of union of the other Serb, Croat, and Slovene provinces with Serbia in 1918, Serbia constituted more than one-third of the total area of the newly enlarged State and approximately one-third of the total population, far exceeding any other single State in the group. The other States turned to Serbia for their rulers, for their seat of government, for their constitutional guarantees. Belgrade, the capital of Serbia, remained the capital of the newly enlarged State. Serbian diplomatic representatives in other capitals of the world became the diplomatic representatives of the Serb-Croat-Slovene State. Serbian legations, consulates, and

"But, as we have already stated, we are of the opinion that the combination of countries into the Kingdom of the Serbs, Croats and Slovenes, and then by internal political action into 'Federal Peoples' Republic of Yugoslavia' was formed by a movement of the Slav people to govern themselves in one sovereign nation, with Serbia as the central or nucleus nation. Great changes in the going government were in the planning, and were brought about, but the combination was not an entirely new sovereignty without parentage. But even if it is appropriate to designate the combination as a *new* country, the fact that it started to function under the Serbian constitution as the home government and under Serbian legations and consular service in foreign countries, and has continued to act under Serbian treaties of Commerce and Navigation and the Consular treaty, is conclusive proof that if the combination constituted a new country it was the successor of Serbia in its international rights and obligations.[1]

"We hold that the district court was in error in holding that the treaty of extradition entered into by and between the United States and Serbia in 1902 does not constitute a valid and subsisting treaty between the United States and the Federal Peoples' Republic of Yugoslavia.

"We place our decision upon our conclusion that the facts, independent of their political implications, do not support the decision of the district court. Nevertheless, we are not without realization of the high importance of such implications. From every practical and logical standpoint every nation must speak to every other nation through its Chief of State.[2] Here, the President, as the Chief of State, in recognizing the continuing validity of treaties between the United States and Serbia has acted upon a reasonable basis of fact peculiarly within his sphere of authority.[3]

missions became the legations, consulates and missions of the Serb-Croat-Slovene State. The Serbian ruling family remained in power, *accepting* sovereignty over the newly annexed provinces. The Serbian Constitution of 1903 continued in force until the adoption of a new constitution in 1921. . . . ."

[1] Hugo Grotius, the father of modern international law, addressing himself to a situation somewhat similar to that under discussion, said:

"Whenever two nations become united, their rights, as distinct states, will not be lost, but will be communicated to each other. . . . The same reasoning holds good respecting states, which are joined, not by a federal *Union*, but by having one sovereign for their head." Grotius, The Rights of War and Peace, 1625, Translation from the Latin by Rev. A. L. Campbell, 1814, Vol. I, p. 339.

"In Crandall, Treaties, it is stated at page 431:

"If a state, after incorporation into another, while losing its international personality still retains a territorial identity with full power of action over the subject-matter of a treaty previously concluded, the other contracting party may reasonably insist upon recognition by the new or acquiring state of the continuing obligation of the treaty, so far as consistent with the new order of things. The continuance of the obligation under such circumstances would however result from the subsequent recognition or mutual agreement of the parties, rather than through state succession."

[2] See e. g. Art. II, § 2, Cl. 2, Constitution of the United States.

[3] *United States* v. *Curtiss-Wright Export Corp.*, 1936, 299 U.S. 304, 319, 57 S.Ct. 216, 81 L.Ed. 255 [*Annual Digest*, 1935–1937, Case No. 18].

"There is no exact formula by which it can be determined that a change of a nation's fortunes amounts to a continuance of the old or the beginning of a new nation, and there can be no better equipped vehicle for decision than the Chiefs of State of the countries concerned. If their agreed decisions, when based upon supporting facts, are not conclusive, they should at least weigh very heavily.[1] As the Supreme Court said in *Terlinden* v. *Ames*, 1902, 184 U.S. 270, 22 S.Ct. 484, 46 L.Ed. 534, an extradition case closely resembling the instant case: 'And without considering whether extinguished treaties can be renewed by tacit consent under our Constitution, we think that on the question whether this treaty has ever been terminated, governmental action in respect to it must be regarded as of controlling importance.' 184 U.S. at page 285, 22 S.Ct. at page 490.

"In our case, open recognition of treaties between the two countries has continued for many years[2] without United States congressional interference, a fact negative in nature, yet highly consistent with the conclusion that the treaties exist in full effectiveness.[1]"

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[1] See *Terlinden* v. *Ames*, 1902, 184 U.S. 270, 288, 22 S.Ct. 484, 46 L.Ed. 534; *Trustees of University* v. *Miller*, 1831, 14 N.C. 188, 193 [Reprint 207, 212]; *Charlton* v. *Kelly*, 1913, 229 U.S. 447, 474, 476, 33 S.Ct. 945, 57 L.Ed. 1274; *Kennett* v. *Chambers*, 1852, 14 How. 38, 55 U.S. 38, 14 L.Ed. 316; *Foster* v. *Neilson*, 1829, 2 Pet. 253, 308, 27 U.S. 253, 308, 7 L.Ed. 415.

See also: Charles C. Hyde, International Law, Chiefly as Interpreted and Applied by the United States, Vol. II, page 1461: "§ 527. Political Questions. In lending their aid to secure performance of treaties, the courts of the United States feel bound to respect the attitude of the political department of the Government with regard to political questions. [Citing *Doe ex dem. Clark* v. *Braden*, 1853, 16 How. 635, 657, 57 U.S. 635, 657, 14 L.Ed. 1090.] Thus whether a treaty is still in force is regarded as one to be determined by that department; and it is declared that 'whether power remains in a foreign State to carry out its treaty stipulations is in its nature political and not judicial'. [*Terlinden* v. *Ames*, 184 U.S. 270, 288, 22 S.Ct. 484, 46 L.Ed. 534.] It has been intimated, however, in behalf of the Supreme Court of the United States, that in a case involving private rights, that Tribunal might be obliged, if those rights were dependent upon the construction of a treaty, and the case turned upon a question public in its nature, which had not been determined by the political department in the form of a law specifically settling it, or authorizing the executive to do so, to render judgment. [Citing *In re Cooper*, 1892, 143 U.S. 472, 503, 12 S.Ct. 453, 36 L.Ed. 232; *Cordova* v. *Grant*, 1919, 248 U.S. 413, 38 S.Ct. 138, 63 L.Ed. 334.]" See also § 533.

It was said in *Oetjen* v. *Central Leather Company*, 1918, 246 U.S. 297, 302, 38 S.Ct. 309, 311, 62 L.Ed. 726: "The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."

See *Guaranty Trust Corp.* v. *United States*, 1938, 304 U.S. 126, 137, 58 S.Ct. 785, 82 L.Ed. 1224 [*Annual Digest*, 1938–1940, Case No. 69]; and Hackworth, Digest of International Law, Vol. I, pages 161–166.

[2] A certificate of the Yugoslav Ambassador and a certificate of the Secretary of State of the United States were filed as exhibits in this case stating that the Treaty of Extradition with Serbia continued in force and was applicable to the territory constituting the Kingdom of the Serbs, Croats and Slovenes and, by changes in name, of the Kingdom of Yugoslavia and the Federal Peoples' Republic of Yugoslavia; See also A list of Treaties and Other International Acts of the United States of America in Force December 31, 1932, published by the Department of State in 1933, and revised in 1941, at p. 94; and the loose-leaf treaty publication, United States Treaty Developments, Appendix III(C), started in 1947.

Disconto Gesellschaft v. *Umbreit*, 1908, 208 U.S. 570, 581, 28 S.Ct. 337, 52 L.Ed. 625.

[Reports: 211 F. 2d 565; *certiorari* denied, 348 U.S. 818, 75 Sup. Ct. 28, 99 L. Ed. 645.]

NOTE.—The decision of the District Court has been noted in *University of Pennsylvania Law Review*, 101 (1953), p. 688.

VIII.—In Matters of Administration. Officials

State Succession—Officials—Substitution of New Constitutent States for Extinct State—Claim of Civil Servant to Pension Originally Payable by Extinct State—Liability of New Constituent State of Federal Republic of Germany—"Functional Succession".

CIVIL SERVICE (LOWER SAXONY) CASE.

German Federal Republic, Federal Supreme Court. May 20, 1954.

THE FACTS.—The plaintiff, a civil servant formerly in the service of Prussia, a constituent State of the German Reich, retired in 1938 and from then onwards was in receipt of a civil service retirement pension. The treasury office in L. paid his pension regularly until 1943, when the plaintiff's home was destroyed by bombing and the plaintiff was compelled to take up residence in a part of Germany which on the conclusion of hostilities formed part of the Soviet-occupied Zone, with the result that from May 1, 1945, until some time in 1949, when he was able to return to the district from which he had been compelled to move in 1943, the plaintiff received no pension. Prussia having meanwhile ceased to exist as a constituent State of the Reich, and the district in which the plaintiff had worked until his retirement having become part of the newly constituted " Land " of Lower Saxony, the plaintiff instituted proceedings against the Government of Lower Saxony for payment of the arrears of his pension between the years 1945 and 1949. As far as here material, he contended that Lower Saxony, as the successor State to that part of Prussia in which he had performed his services as a civil servant, was liable for the arrears of his pension. On behalf of the Government of Lower Saxony, it was contended that this was not a case of State succession and that the " Land " of Lower Saxony was not liable.

Held: that this was a case of so-called " functional succession ", and as the newly constituted " Land " of Lower Saxony comprised the district in which the plaintiff had performed his services to the State of Prussia (now extinct), the " Land " of Lower Saxony was liable to pay the arrears of his pension.

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[1] *Ribas y Hijo* v. *United States*, 1904, 194, U.S. 315, 324, 24 S.Ct. 727, 48 L.Ed. 994; *Fong Yue Ting* v. *United States*, 1893, 149 U.S. 698, 720, 13 S.Ct. 1016, 37 L.Ed. 905; *Chae Chan Ping* v. *U. S.* (*Cninese Exclusion Case*), 1889, 130 U.S. 581, 600, 9 S.Ct. 623, 32 L.Ed. 1068; *Whitney* v. *Robertson*, 1888, 124 U.S. 190, 194, 8 S.Ct. 456, 31 L.Ed. 386; *Edye* v. *Robertson* (*Head Money Cases*), 1884, 112 U.S. 580, 599, 5 S.Ct. 247, 28 L.Ed. 798.

The Court said:[1] " Lower Saxony is liable for the plaintiff's pension from the point of view of ' functional succession ', a concept which has been developed in the jurisprudence of the Third Senate in Civil Matters of the Federal Supreme Court. With regard to the liability of the State for violation of official duties the Third Senate has, so far as concerns the disappearance of a juridical person of public law—including the factual disappearance of such a person as a result of the legal incapacity of the whole of the German Reich—adopted as the decisive criterion, not the ' formal identity of the juridical person, but the substantive identity of the organization, its means and its purposes ', and it has held the functional successor liable for the obligations of the functional predecessor. This principle has also been applied to liabilities resulting from contracts with civil servants where such contracts have been made by the juridical person formerly responsible in the functional sense, with the result that the liability of the ' Länder ' arising from functional succession has been extended so as to include the claims of acting civil servants who on May 8, 1945, occupied established positions within the territory of the ' Land ' concerned.

" The present case differs from those previously decided by the Federal Supreme Court in that in the present case we are not concerned with a civil servant holding office, but with a civil servant in retirement. This distinction, however, does not justify any deviation from previous decisions. The plaintiff worked for many years in the territory of present-day Lower Saxony, at the Land Registry of L., where he also commenced his retirement. Although Prussia was dissolved by virtue only of Control Council Law No. 46 of February 24, 1947, it was in fact legally incapacitated from 1945 onwards. The Land Registry—as indeed all matters relating to the registration of land in the district—was taken over and continued to be administered by Lower Saxony . . . As long as the German Reich and Prussia still possessed legal capacity, the liability towards the plaintiff was not a burden referable only to a particular locality, but was a general State liability detached from the locality in which the services had been performed and in which the pension had become payable. In view of the fact that as a result of supervening legal incapacity Prussia and the German Reich can no longer be proceeded against, and, on the other hand, having regard to the circumstance that the governmental institution in which the plaintiff performed his services has been taken over by a specified successor State (Lower Saxony), it accords with the legal concept of functional succession to hold that territorial entity liable for the plaintiff's claim which has taken over the Land Registry in whose district the plaintiff performed his services and in which he commenced his retirement . . ."

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[1] The extracts from the judgment which follow are those concerned with the question referred to in the headnote, this being the only matter of interest from the point of view of international law.

[Report: JZ, 9 (1954), p. 489.]

State Succession—Officials—Contracts of Military Service—Netherlands and Indonesia

Van Os *v.* State of the Netherlands.

Holland, Court of Appeal of The Hague. April 7, 1954.

The Facts.—On October 31, 1949, the plaintiff entered into a contract with the General Officer in Command of the Netherlands Antilles Army, who acted on behalf of the Netherlands Indies Government. Under the terms of the contract he was to join the K.N.I.L. (Royal Netherlands Indies Army) for a period of three years for services in Surinam or the Netherlands Antilles. However, before the contract was terminated the K.N.I.L. had been dissolved by virtue of the Transfer of Sovereignty to Indonesia Act. The plaintiff had left the army so as to avoid repatriation to the Netherlands, where he would have been dismissed because of the army having been dissolved. He sued the State of the Netherlands for damages in the District Court of The Hague. The Court dismissed his claim, and he appealed to the Court of Appeal of The Hague. He contended that the Transfer of Sovereignty to Indonesia Act did not create an obligation for the Government of the Netherlands to dissolve the whole of the K.N.I.L. but only those contingents of that army which were stationed in Indonesia. Since he did not belong to the units stationed in Indonesia but to those serving in the Netherlands Antilles, the Netherlands Government could not, he maintained, dismiss him when they decided to dissolve the K.N.I.L. The relevant provisions of the Agreements between the Netherlands and Indonesia are set out in the *Held* below.

Held: that the appeal must be rejected and the judgment of the Court below upheld.

The Court said: " When sovereignty was transferred, the legal person of the Netherlands Indies ceased to exist. In its place the Sovereign Republic of the United States of Indonesia came into being. As a consequence the K.N.I.L., which was considered in Indonesia as being an exponent of the colonial system, had to cease to exist. This principle was expressed in Article 31, para. 4, of the Agreement on the Land Forces under Netherlands Command in Indonesia, which is one of the instruments negotiated during the Round Table Conference. That paragraph provided as follows:

> ' On completion of the reorganization the Royal Netherlands Indies Army shall cease to exist. If after the completion of the

> reorganization a further winding up of the armed forces referred to in Article 4 proves necessary, the Governments of the Kingdom of the Netherlands and the Republic of the United States of Indonesia shall consult each other on this matter in good time.'

As appears from the general terms of this provision and in view of the historical importance of the transfer of sovereignty, it can have no other meaning but that the K.N.I.L. had to cease to exist in its entirety and irrespective of the parts of the world where the units of that army were stationed. This had also been laid down in the Royal Decree of July 20, 1950. It is true that there are in the Agreement provisions which make it possible for personnel of the K.N.I.L. stationed in Indonesia to be transferred from the service of this army into that of the Republic. It is obvious, however, that these provisions were only made with a view to giving Indonesians who were serving with the K.N.I.L. an opportunity to join the Land Forces of the Republic. It cannot be concluded from this that the units of the K.N.I.L. stationed outside Indonesia could be kept in existence.

"Article 26 of the Agreement lays down as follows:

> 'During the reorganization of the aforementioned armed forces the administrative and judicial powers which the Indonesian legislation in force before the transfer of sovereignty conferred on the High Commissioner of the Crown with regard to the armed forces referred to in Article 4, shall be executed by or on behalf of the King of the Netherlands.'

It is true that the Explanatory Memorandum of the Agreement with reference to Article 26 states that this Article defines the status of the K.N.I.L. during the time of its reorganization as 'Netherlands Armed Forces which are in the process of being disbanded.' From this, however, it does not necessarily follow that the K.N.I.L. had become part of the Netherlands Land Forces and that the plaintiff must be regarded as being a member of those forces.

"Article 31, para. 3, of the Agreement lays down:

> 'In mutual consultation the Governments of the Kingdom of the Netherlands and of the Republic of the United States of Indonesia may determine that after the completion of the reorganization certain services or sections of services will be continued for the performance of certain tasks and for a definite period.'

A plea based on this provision cannot be entertained since there is no evidence that the plaintiff belonged to the category of persons to which this provision refers. Furthermore, the plaintiff contended that the authorities who entered into a contract with him were, at the time they were doing so, aware of the fact that the K.N.I.L. was to be disbanded. This plea, too, could not avail, since the defendant—the State of the Netherlands—was not a party to the contract.

The State could not have committed an unlawful act against the plaintiff since it had not itself performed any formal act as regards the plaintiff."

[Report: *N.J.*, 1954, No. 599.]

IX.—Continuity of the Law. Judgments of Courts. Pending Actions.

State Succession—Judgments of Courts—Jordan and Palestine.

See p. 457 (*Ottoman Bank* v. *Jabaji*).

PART III

STATE TERRITORY

A—IN GENERAL

I.—Nature of Territorial Sovereignty

Territorial Sovereignty—Infringement of—Abduction of Persons for the Purpose of Handing Them Over to Foreign Authorities.

ISELI AND OTHERS *v.* PUBLIC PROSECUTOR OF THE CANTON OF ZÜRICH.

Switzerland, Cour de Cassation. August 14, 1954.

THE FACTS.—In August 1952 the three appellants invited a watch dealer to accompany them in their car, with some 1,300 watches, to a town on the German frontier, on the pretext that they would there meet a prospective buyer of the watches. On arrival at the frontier, the watch dealer was persuaded to leave the watches in the car and to cross to the German side of the frontier for a meal. Without the knowledge of the watch dealer one of the appellants took fifty of the watches into Germany. At the restaurant these watches were given to the watch dealer. At the same time one of the appellants telephoned the German customs authorities and denounced the watch dealer for smuggling. The latter was accordingly arrested in the restaurant. The purpose of the denunciation was to enable the appellants, following the arrest of the watch dealer, to steal the watches which had remained in their car. They were caught. In December 1953 a jury in the Canton of Zürich found them guilty of theft and of unlawful acts on behalf of a foreign State, in that they handed over the watch dealer to the German authorities, in violation of Article 271 (2) of the Penal Code. This was an appeal from that conviction.

It was contended on behalf of the appellants that Article 271 (2) of the Penal Code, concerning the handing over of persons to a foreign authority, applied only to cases where such persons were liable to political persecution.

Held: that the appeal must be dismissed. The prohibition of handing persons over to foreign authorities, which was intended to protect the territorial sovereignty of Switzerland, was not limited to political fugitives.

The Court said: " Article 271 (2) of the Penal Code subjects to punishment any person ' who abducts another person to a foreign country, by force, stealth or threats, for the purpose of handing that other person over to a foreign authority, party, or other organization, or exposing him to danger of life or limb '. This provision was essentially taken over from the Federal Decision of June 21, 1935, concerning the Protection of the Safety of the Confederation. In the Message concerning the Decision the Federal Council referred to the cases of *Rossi*, *Weber* and *Jacob*, cases of political abduction to fascist or national-socialist foreign States which were well known at the time. The provision was then brought into being as a result of cases of political abduction. Its terms are not, however, limited to such cases. Except with reference to the handing over of a person to a party intrinsically connected with political persecution, such a limitation would not have been defensible, since the activity of foreign authorities does not normally lie in the sphere of political persecution. Nor can a limitation to political cases be deduced from the fact that the minimum sentence for an offence under Article 271 (2) is one year's penal servitude. The abduction of a person to a foreign country, by force, stealth or threats, for the purpose of subjecting the victim to prosecution by foreign authorities is a serious matter even where the prosecution is not political in nature but is in conformity with the laws of the State in question. This is particularly so in cases, such as the present one, where there is prosecution in respect of a fiscal offence, for which, as for political offences, extradition is not granted. A limitation to political offences would also be contrary to the deeper meaning of the provision. Article 271 (2) of the Penal Code was not enacted in order to protect individuals against political persecution, but to protect the State. . . . There is an infringement of the territorial sovereignty of Switzerland when a person acts as the tool of a foreign authority, party or other organization in order to enable it, by means of abduction, to lay hands on persons subject to Swiss sovereignty. From this point of view it does not make any difference whether the offence was committed for political or other reasons."

[Report: *Arrêts du Tribunal fédéral suisse*, vol. 80 (1954), Part IV, p. 151.]

II.—Acquisition of Territorial Sovereignty

iii.—Cession. Plebiscite

State Territory—In General—Acquisition of Territorial Sovereignty — When Cession Not Effected — Retention of " Residual Sovereignty "—Position of Ryukyu Islands under the Treaty of Peace with Japan.

See p. 82 (*United States* v. *Ushi Shiroma*).

v. Conquest and Annexation

Annexation—Effect on Treaties—Treaty Concluded by Annexed State—Annexation of Austria by German Reich—Whether Treaty between Austria and France Affected by Subsequent Outbreak of War between France and Germany.

See p. 262 (*Heller* v. *La Soie de Paris*).

V.—Occupation of Foreign Territory in Time of Peace

State Territory—Occupation of Foreign Territory in Time of Peace—" Residual Sovereignty " of Japan in Ryukyu Islands under Treaty of Peace—Cession Not Effected—Whether Resident of the Ryukyus a National of the United States of America.

UNITED STATES *v.* USHI SHIROMA.

United States, District Court, District of Hawaii. August 12, 1954.

THE FACTS.—The defendant was born in Okinawa, Ryukyu Islands, of Okinawan parents. He became a resident of Hawaii in 1913. In 1954, an information was filed against him charging him with violation of 8 U.S.C. 1306 (b) in that, being an alien, he had failed " to notify the Attorney General in writing of his current address and to furnish such additional information as is by regulations required by the Attorney General ". The defendant argued that Okinawa had become a possession of the United States pursuant to Article 3 of the Treaty of Peace with Japan, signed at San Francisco, September 8, 1951, T.I.A.S. No. 2490, and that he was therefore not an alien.

Held: that the defendant was guilty of the offence charged. The provision of the Treaty of Peace granting to the United States " all and any powers of administration, legislation and jurisdiction " over the Ryukyu Islands did not effect a cession thereof, and " residual sovereignty " in the Islands remained in Japan. The defendant was therefore an alien. The construction of the terms of the Treaty by the Department of State is entitled to great weight.

The Court said: " A novel defense interjected at trial raised the legal question of whether the defendant was an alien in January 1954, the time of the alleged offense.

" The defendant ingeniously argued that, because of events occurring subsequent to World War II, Okinawa became a possession of the United States. Thus, being a native of Okinawa, although residing in Hawaii, the defendant became a national of the United States. Consequently, not being an alien, he was legally incapable of committing the offense charged in the information.

" Initially, the definitions found in the Immigration and Nationality Act of 1952, 8 U.S.C.A. § 1101 *et seq.*, are helpful. Section 1101 (a) (3) provides:

> ' The term " alien " means any person not a citizen or national of the United States.'

" The term ' national of the United States ' is defined in Section 1101 (a) (22) as follows:

> ' The term " national of the United States " means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.'

" Although the defendant admits that he is not a citizen of the United States, the question remains whether he is a national of the United States. In other words, does the defendant owe permanent allegiance to the United States ?

" Permanent allegiance is a correlative of the concept of sovereignty. Whether the defendant owes permanent allegiance to the United States depends on whether American sovereignty extends over Okinawa.

" Sovereignty may be defined broadly as the ' supreme will '. See *United States* v. *Curtiss-Wright Export Corp.*, 1936, 299 U.S. 304, 317, 57 S.Ct. 216, 81 L.Ed. 255,[1] *Cobb* v. *United States*, 9 Cir., 1951, 191 F.2d 604, 608, *certiorari* denied, 1952, 342 U.S. 913, 72 S.Ct. 360, 96 L.Ed. 683.[2] This case, indeed, lends support to the statement that the ' concept of " sovereignty " is in a state of more or less solution these days.' *United States* v. *Spelar*, 1949, 338 U.S. 217, 224, 70 S.Ct. 10, 13, 94 L.Ed. 3. Recently, the Ninth Circuit endorsed this observation in *Cobb* v. *United States, supra*, 191 F.2d at page 608. Be that as it may, sovereignty *is*, and this justiciable controversy requires a judicial determination.

" Okinawa is an island in the Ryukyu Archipelago. It can be judicially noticed that, prior to Word War II, Japan had sovereignty over the Ryukyus. During Word War II, the United States conquered and occupied Okinawa. Such occupation continued and was effective at the time the Treaty of Peace with Japan was signed on September 8, 1951. U.S.Code Cong. & Adm. Service, 1951, pp. 2730–2748. The Treaty of Peace was subsequently ratified by the United States Senate on March 20, 1952. 98 Cong.Rec. 2594.

" Prior to the signing of the Treaty of Peace, the courts deemed Okinawa a ' foreign country ' within the meaning of the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671–2680. See *Cobb* v. *United States, supra*; *Brewer* v. *United States*, D.C.N.D.Cal.1948, 79 F. Supp. 405.[3] In the *Cobb* case, the court stated, 191 F.2d at page 608, as follows:

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[1] See *Annual Digest*, 1935–1937, Case No. 18.]

[2] See *International Law Reports*, 1951, Case No. 173.]

[3] See *Annual Digest*, 1948, Case No. 169.]

> ' The United States has . . . acquired, and still retains, what may be termed a " *de facto* sovereignty " [over Okinawa].
>
> ' However, the traditional " *de jure* sovereignty " has not passed to the United States. The conqueror does not acquire the full rights of sovereignty merely by occupying and governing the conquered territory without a formal act of annexation or at least an expression of intention to retain the conquered territory permanently.'

" The question then is whether the United States acquired the traditional ' *de jure* sovereignty ' over Okinawa under the Treaty of Peace. Our concern is solely with ' *de jure* sovereignty ', because only this time-tested yardstick of international law should be applied in determining the status of a geographical area and its inhabitants. In other words, permanent allegiance is owed only to a ' *de jure* sovereign.'

" The pertinent part of the Treaty of Peace is Article 3, which reads as follows:

> ' Japan will concur in any proposal of the United States to the United Nations to place under its trusteeship system, with the United States as the sole administering authority, Nansei Shoto south of 29° north latitude (including the Ryukyu Islands and the Daito Islands), Nampo Shoto south of Sofu Gan (including the Bonin Islands, Rosario Island and the Volcano Islands) and Parece Vela and Marcus Island. Pending the making of such a proposal and affirmative action thereon, the United States will have the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of these islands, including their territorial waters.'

" The defendant baldly contends that under Article 3 the United States acquired sovereignty over Okinawa, Ryukyu Islands. To this, the Court cannot subscribe.

" Sovereignty over a territory may be transferred by an agreement of cession. See 1 Hackworth, Digest of International Law 421 (1940). Here neither in Article 3 nor in any other article of the Treaty of Peace does Japan *cede* Okinawa to the United States. In Article 2, Japan formally ' renounces all right, title and claim ' to certain specified territories, including Korea, Formosa and the Kurile Islands. However, there is no such renunciation as to the territories named in Article 3.

" On September 5, 1951, John Foster Dulles, who as a consultant to the Secretary of State was instrumental in negotiating the treaty, made a speech at the Conference for the Conclusion and Signature of the Peace Treaty with Japan. See 25 Dept. State Bulletin 452–9 (1951). At that time, Mr. Dulles in explaining the principal provisions of the treaty made the following statement:

> ' Article 3 deals with the Ryukyus and other islands to the south and southeast of Japan. These, since the surrender, have been under the sole administration of the United States.
>
> ' Several of the Allied Powers urged that the treaty should require Japan to renounce its sovereignty over these islands in favor of United

> States sovereignty. Others suggested that these islands should be restored completely to Japan.
>
> 'In the face of this division of Allied opinion, the United States felt that the best formula would be to permit Japan to retain *residual sovereignty*, while making it possible for these islands to be brought into the U.N. trusteeship system, with the United States as administering authority.' (Emphasis added.) Id. at p. 455.

"The reasonable construction of treaty terms by the State Department, acquiesced in by the other signatory powers, is entitled to great weight. *United States* v. *Reid*, 9 Cir., 1934, 73 F.2d 153, 156, *certiorari* denied, 1936, 299 U.S. 544, 57 S.Ct. 44, 81 L.Ed. 400. Thus Mr. Dulles' construction of Article 3, as opposed to defendant's contentions, is very persuasive.

"Furthermore, to the Government's reply brief is attached a copy of a letter dated May 14, 1952, addressed to a Mr. Overton from the Legal Adviser of the Department of State.

"The letter states in part as follows:

> '1. A legal opinion is requested on the request of the Japanese Vice Minister for Foreign Affairs dated 10 December, 1951, that the United States confirm that the "Southern Islands" (the Ryukyus and the Bonins) remain under the sovereignty of Japan and that their inhabitants remain Japanese nationals.
>
> . . . . .
>
> '6. It is concluded that sovereignty over the Ryukyu and Bonin Islands remains in Japan, and that the inhabitants thereof are Japanese nationals.'

"'Residual sovereignty' referred to by Mr. Dulles is a concept difficult to define. The defendant analogizes 'residual sovereignty' to a 'future interest' and conceives it to mean that sovereignty is to arise *in futuro*. Therefore, he argues, under Article 3, 'present sovereignty', the antithesis of 'residual sovereignty', is in the United States, making him a 'national.' However, under the law of property, a holder of a 'future interest' presently has a bundle of rights, privileges and duties although the right of possession or enjoyment is postponed until the future. See 1 Simes, Law of Future Interest 2–3 (1936). Moreover, the importation of the niceties from the law of property into the field of international law confuses rather than aids in resolving the instant problem. See Justice Frankfurter's comments concerning the application of the 'unwitty diversities of the law of property' in estate tax cases in *Helvering* v. *Hallock*, 1940, 309 U.S. 106, 118, 60 S.Ct. 444, 450, 84 L.Ed. 604.

"The adjective 'residual' means of the nature of something left as residue. Thus the concept of 'residual sovereignty' starts with the assumption that sovereignty is capable of division.

"Under Article 3 of the Treaty of Peace, Japan which previously had full sovereignty over Okinawa transferred a part of that sovereignty, while retaining the residue. That portion of the sovereignty which gives the United States ‘ the right to exercise all and any powers of administration, legislation and jurisdiction ’ under Article 3 may be labeled ‘ *de facto* sovereignty ’. The residue or ‘ residual sovereignty ’ retained by Japan is the traditional ‘ *de jure* sovereignty.’ What the situation will be when the United States, under Article 3, makes a proposal to the United Nations to place Okinawa under its trusteeship system and affirmative action is taken thereon is not presently material.

“ Japan, and not the United States, having ‘ *de jure* sovereignty ’ over Okinawa since the ratification of the Treaty of Peace, the defendant is not a national of the United States. Being therefore an alien, he was required to give the Attorney General written notice of his current address within a specified time as directed by 8 U.S.C.A. § 1305.”

[Report: 123 F. Supp. 145.]

VII.—Sovereignty Over the Air

i.—Air Navigation Conventions

Air Law—International Air Law Conventions—Interpretation of Warsaw Convention of 1929 on International Carriage by Air.

See p. 286 (*American Smelting and Refining Co. et Al.* v. *Philippine Airlines Inc. of Manila*).

B—PARTS OF STATE TERRITORY

I.—Boundaries

i.—Land Boundaries

Boundaries—Frontier Districts—Properties Intersected by the Frontier—Export Regulations—Netherlands-Belgian Boundary Treaty of 1843 and Netherlands Foreign Exchange Control Regulations.

Public Prosecutor *v.* De M.

Holland, Supreme Court. April 13, 1954.

The Facts.—The defendant was a Belgian national who owned a so called “ treaty pasture ”. (These are meadows intersected by the Netherlands-Belgian frontier.) He had purchased cattle in the Netherlands and brought the animals into his pastures. He did not, however, possess the documents required for export by virtue of Article 21 of the Netherlands Foreign Exchange Control Decree, 1945. The defendant had been convicted by the Police Magistrate for Economic Affairs at Middelburg, in the Province of Zealand, for violation of the provisions of the Decree. On appeal, he had been acquitted by the Court of Appeal of The Hague. In the opinion of the Court of Appeal there was no evidence of the defendant's intention to export the cattle to Belgium. The Court was satisfied that the defendant only wished to make the cattle a permanent part of the herd of his farm, in which was comprised the treaty pasture. This the Court of Appeal held to be permissible by virtue of Article 37 of the Netherlands-Belgian Boundary Treaty of Maastricht of August 8, 1843, in conjunction with Article XX of the Austrian-Russian Treaty of May 3, 1815.

Held: that the judgment of the Court below must be quashed and the original conviction upheld.

The Court said: " By virtue of Articles 37 and XX, respectively, owners of real estate intersected by the boundary-line have the right to take their cattle from one part of their property intersected by the boundary-line to another part of such property. The sole purpose of these provisions is to allow them to take across the frontier without hindrance cattle that already form part of their farming operations on the treaty-pastures, since without such permission farming could not be properly carried on. The purpose of these provisions, however, cannot be that cattle purchased in the Netherlands which have not yet been taken into the treaty-pastures may be freely brought into such pastures. For in that case cattle could cross the frontier without hindrance once they were in the treaty pastures, and the export of such cattle could not be controlled. It also follows from the provisions of Article 38 of the Treaty of Maastricht that there was no intention to allow such exports. Article 38 lays down that such owners shall remain subject to the formalities prescribed by the import, export and transit laws of both States, so as to prevent any abuse. This intention, which is limited, is further stressed by the provisions of the Additional Article of the Treaty.

[Report: *N.J.*, 1954, No. 388.]

NOTE.—Although the judgment here reported is concerned primarily with the interpretation of particular provisions of the Treaty, it is reported here as being of interest for the régime of boundary districts generally.

II.—Rivers

iii.—International Rivers

(a) The Principle of Freedom of Navigation on International Rivers.

International Rivers—Freedom of Navigation on—Rhine Convention—Treaty Provisions in Relation to the Territorial State's Own Subjects—Direct Operation of Treaty.

See p. 3 (*Public Prosecutor* v. *J. de B.*).

International Rivers—Freedom of Navigation on—Rhine Navigation Convention—Denunciation by Germany—Revival of the Treaty.

See p. 276 (*Nederlandsche Rijnvaartvereeniging* v. *Damco Scheepvaart Maatschappij*).

(b) Functions and Competence of International Commissions on International Rivers.

International Rivers—Rhine Navigation Convention—Competence of Rhine Navigation Tribunals—Admissibility of Alternative Tribunals within the Same Riparian State.

See p. 300 (*Geervliet* v. *Belgian Corporation Scheepswerf de Durme*).

III.—Territorial Waters

iv.—Innocent Passage

Territorial Waters—Innocent Passage—Meaning of.

See p. 105 (*Japan* v. *Kulikov*).

PART IV

JURISDICTION

A—IN GENERAL. TERRITORIAL AND PERSONAL

I.—Territorial

ii.—Criminal and Other Jurisdiction over Foreigners

Jurisdiction—Territorial—Over Aliens Abroad—Service of Writs or Notice Thereof—Actions for Debt Against Aliens Resident Without the Jurisdiction—Conditions under which the Courts of New Zealand will Entertain such Proceedings.

BHAGA *v.* PARBHU.

New Zealand, Supreme Court, Wellington. June 15, 1954.
(Turner J.)

THE FACTS.—Bhaga and Parbhu were Indians. Both of them emigrated to New Zealand, and established themselves as fruiterers in Wellington. The present proceedings arose out of an alleged loan, free of interest and repayable on demand in New Zealand, made by Bhaga, in the presence of witnesses, to Parbhu in May 1950. When demand was made for repayment it was found that Parbhu had gone to live in India, from where he denied the existence of any such debt. Though he had left the country it appeared that he was still part owner of certain landed property in Wellington. Bhaga filed a statement of claim, in the Supreme Court, Wellington, alleging the debt and seeking to attach this property as payment. He moved *ex parte* for an order granting leave to serve the defendant with the writ outside New Zealand. This order was eventually granted by Fair J., on December 12, 1952. The learned Judge took the view that Parbhu was domiciled in India, that he remained a British subject, and that he might be served with the writ in terms of the Code of Civil Procedure. The writ was duly served; no defence was entered within the set time; judgment was given by default; and an order issued charging the defendant's land in New Zealand with the amount of the judgment. At this point Parbhu took steps to defend his case, and instructed his New Zealand solicitors to resist further action by filing a motion to set the judgment aside. This latter move was successful, as it was proved that service of the writ was invalid as it had been effected on a Sunday. The plaintiff, however, gained an order renewing the writ for six months. The defendant now moved to stay all proceedings in the action on the ground that he was " resident and domiciled in the State of India ", and that he was " not a British subject but is a national of the State of India and upon the grounds that this Honourable Court has no jurisdiction over the defendant ". It was agreed by counsel that the motion should be treated as a review of the order made *ex parte* by Fair J. granting leave to serve a writ abroad.

Held: that the motion should be dismissed, and proceedings allowed to continue. This was a case in which service of a writ without the jurisdiction would be allowed at the discretion of the Court.

The Judge said: " I understand counsel [for the defence] to put forward the following argument. (1) A party may be served with a writ: (a) if present in New Zealand to be served, or (b) by leave of the Court, abroad. (2) The defendant is not a British subject since the recognition of India as a Republic. (3) The Court will not grant leave to serve abroad a person who is not a British subject. In support of this last submission, counsel cited *Cookney* v. *Anderson* ((1862) 1 De G. J. & S. 365); *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* ([1894] A.C. 670), and *Wallace* v. *Bastings* ((1899) 18 N.Z.L.R. 639).

" I am unable to accept the argument of counsel put forward in the above terms. His first submission is, of course, perfectly correct. I leave the second unexamined since I do not think it necessary, on the view that I take of the case, to consider its validity; but I do not wish it to be thought that I necessarily regard it as acceptable. As to his third submission, I do not find it supported by the authorities which he quotes. Indeed, the provisions of R. 51A of the Code of Civil Procedure appear to contemplate an exactly opposite state of affairs, for this Rule is worded as follows:

> ' 51A. When it is proposed that service should be effected on a person who is not a British subject and in a country which is neither part of Her Majesty's Dominions nor a territory held by Her Majesty under mandate or protectorate, then, in lieu of service of the writ of summons, service of notice of the writ shall be effected and any order for service shall direct accordingly, and in such service of the notice of the writ shall have all the consequences of service of the writ under these rules.'

It is clear from a perusal of this Rule that counsel's contention can go no further than this—that, if the defendant is a British subject, leave may be given to serve him abroad with the writ, whereas, if he is not, a notice of the writ, and not the writ itself, should be directed to be served. The reason for this seems to be well explained by Jessel M.R. in *Fowler* v. *Barstow* ((1881) 20 Ch. 240) as follows: ' The object of the rule was this, that if you have a British subject anywhere you may serve him with a writ; there is no objection to it whether he is residing in a foreign country or whether he is residing in a part of the Queen's dominions, but if he is not a British subject, and you want to serve him out of the Queen's dominions, you must not serve him with a writ, because most foreign countries would object to that. You must serve him with the notice which is provided for by the rules . . .' "

The Judge distinguished the instant case from *Cookney* v. *Anderson* (*supra*) on the ground that in the present case property was present within the jurisdiction against which any judgment could be enforced, while, in *Cookney's* case, a judgment was sought against property outside the jurisdiction. He considered *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* was irrelevant in the present circumstances, as it was a case dealing with the enforcement of foreign judgments, and this was a question of leave to serve a writ abroad. He continued: " I therefore come without difficulty to the conclusion that, if the defendant is a British subject, leave may be given to serve him abroad with a writ; and, if he is not a British subject, leave may be given to serve him abroad with a notice of the writ. . . ."

It proved unnecessary to decide whether Parbhu was a British subject as his counsel was prepared to accept either service or notice of the writ on his client's behalf, if the Judge decided that this was a case where the Court should exercise its discretion and permit the writ to issue. On this last point the Judge said:

" The plaintiff resides in this country. The money was allegedly lent here. It is allegedly repayable here. The defendant resides in India and has property in New Zealand. It is alleged that witnesses, all of whom are resident in New Zealand, can give *viva voce* evidence of the contract in support of the plaintiff's claim. If this is a fair statement of the facts, it would undoubtedly be a considerable hardship to the plaintiff to stay the action . . . and compel the plaintiff to sue in India, since he and his witnesses would presumably have to travel to that country to prosecute his action; but it seems plain that, whichever way the matter is decided, one party or the other must travel from his present residence to another country if the whole of the evidence is to be heard *viva voce* by the Court. If, therefore, I allow the order of Fair J. to stand, I am compelling the defendant to elect whether he will come to New Zealand at considerable expense to himself, or whether he will submit to having the action determined by a New Zealand Court without being personally present—a course which may place him at a disadvantage. In deciding what course I should follow, I think that I should be guided by the principle stated in the headnote to *Logan* v. *Bank of Scotland* (No. 2) ([1906] 1 K.B. 141) which reads as follows: ' The Court will stay an action, brought within the jurisdiction, in respect of a cause of action arising out of the jurisdiction, if satisfied that no injustice will be done thereby to the plaintiff, and that the defendant would be subject to such injustice in defending the action as would amount to vexation and oppression, to which he would not be subjected if an action were brought, in another and accessible Court, where the cause of action arose ' . . . If I have so to exercise my discretion here, I think that the balance of convenience and justice requires the order of Fair J. to stand. In so deciding, I have taken into account the fact that any apparent injustice done to the defendant may, at least in part, be the subject of appropriate compensation in costs if at a later stage this appears just . . . "

[Report: (1954) N.Z.L.R. 1039.]

Jurisdiction—Over Aliens Abroad—Persons Acquiring Nationality of the Forum after Commission of Offence—India and Pakistan—Coming into Force of Constitution of India—Jurisdiction to Try Offences Committed Outside India.

CENTRAL BANK OF INDIA LTD. *v.* RAM NARAIN.

India, Supreme Court. October 12, 1954.

(Mahajan C.J.; Mukherjea, Bose, Jagannadhadas and Ayyar JJ.)

THE FACTS.—The Government of East Punjab (India) sanctioned the prosecution of the respondent, under s. 188 of the Code of Criminal Procedure read with s. 4 of the Indian Penal Code, for offences committed in Mailsi (Pakistan) in November 1947, *i.e.*, before his migration to India. The relevant provisions are set out in the *Held* below. The respondent contended that at the time of the alleged offences he was a national of Pakistan and his prosecution in India was unlawful. The High Court of Punjab held that the Punjab Government had no power to sanction the prosecution. On appeal to the Supreme Court,

Held: that the decision of the High Court of Punjab that Ram Narain could not be tried in any court in India for offences committed in Mailsi in November 1947 was correct, and that the Provincial Government had no power under s. 188 of the Code of Criminal Procedure to accord sanction to his prosecution.

The Court said: " The sole question for determination in the appeal is whether on a true construction of s. 188 of the Code of Criminal Procedure and s. 4 of the Indian Penal Code, the East Punjab Government had power to grant sanction for the prosecution of Ram Narain for offences committed in Pakistan before his migration to India.

" The relevant portion of s. 4 of the Indian Penal Code, before its amendment, read as follows:

> ' The provisions of this Code apply also to any offence committed by (1) any native Indian subject of Her Majesty in any place without and beyond British India . . .'

Since 1950, the wording is:

> ' Any citizen of India in any place without and beyond India . . .'

" Section 188 of the Code of Criminal Procedure formerly provided:

> ' When a native Indian subject of Her Majesty commits an offence at any place without and beyond the limits of British India . . . he may be dealt with in respect of such offence as if it had been committed at any place within British India at which he may be found.'

These wordings were subsequently adapted after the formation of the two Dominions [of India and Pakistan] to read as follows:

> ' When a British subject domiciled in India commits an offence at any place without and beyond all the limits of the Provinces . . . he may be dealt with in respect of such offence as if it had been committed at any place within the Provinces at which he may be found.'

After 1950, the amended section read as follows:

> ' When an offence is committed by (a) any citizen of India in any place without and beyond India . . . he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found.'

" The learned Attorney-General contended that at the time when sanction for his prosecution was given by the East Punjab Government, Ram Narain was a citizen of India residing in Hodel, and that, that being so, he could be tried in India as being a citizen of India at that moment who had committed offences outside India, and that the provisions of s. 4 of the Indian Penal Code and s. 188 of the Code of Criminal Procedure were fully attracted to the case. In our opinion, this contention is not well founded. The language of the sections plainly means that if at the time of the commission of the offence the person committing it is a citizen of India, then even if the offence is committed outside India he is subject to the jurisdiction of the courts in India. The rule enunciated in the sections is based on the principle that *qua* citizens the jurisdiction of the courts is not lost by reason of the venue of the offence. If, however, at the time of the commission of the offence the accused person is not a citizen of India, then the provisions of these sections have no application whatsoever. A foreigner was not liable to be dealt with in British India for an offence committed and completed outside British India under the provisions of the sections as they stood before the adaptations made in them after the Partition of India. Illustration (a) to s. 4 of the Indian Penal Code delimits the scope of the section, and indicates its extent and ambit. It runs as follows:

> ' (a) *A*, a coolie who is a native Indian subject commits a murder in Uganda. He can be tried and convicted of murder in any place in British India in which he may be found.'

In the illustration, if *A* was not a native Indian subject at the time of the commission of the murder, the provisions of s. 4 could not apply. The circumstance that after the commission of the offence a person becomes domiciled in another country or acquires the citizenship of another State, cannot confer jurisdiction on the Courts of that State retrospectively for the purpose of trying offences committed and completed at the time when that person was neither a national of that country nor domiciled there.

" The question of the nationality of Ram Narain does not really arise in the case. The real question to be determined here is whether Ram Narain had an Indian domicile at the time of the commission of the offence. Persons domiciled in India at the date of the coming into force of our Constitution were given the status of citizens, and they thus acquired Indian nationality. If Ram Narain had an Indian domicile at the time of the commission of the offence, he would certainly come within the ambit of s. 4 and s. 188 above-mentioned. If, on the other hand, he was not domiciled in India at the relevant date, those sections would have no application to his case.

" The question, therefore, can be posed thus: can it be said that Ram Narain at the time of the commission of the offence was domiciled in India ? That question can only be answered in one way, *viz.*, that he was not domiciled in India. Admittedly, then, he was not a citizen of India because that status was given by the Constitution that came into force in January 1950. He had no residence or home in the Dominion of India. He may have had the *animus* to come to India, but that *animus* was indefinite and uncertain. There is no evidence at all that at the moment he committed the offence he had finally made up his mind to take up his permanent residence in India, and a matter of this kind cannot be decided on conjectural grounds. It is impossible to read a man's mind, but it is even more than impossible to say how the minds of people worked during the great upheaval of 1947.

" The learned Attorney-General argued that Ram Narain was a native Indian subject of Her Majesty before August 15, 1947, and that description continued to apply to him after August 15, 1947, whether he was in India or in Pakistan; but we think that the description " Native Subject of His Majesty " after that date became applicable in the territory now constituted as India only to residents of Provinces within the boundaries of India, and in Pakistan to residents of Provinces within the boundaries of Pakistan. Until Ram Narain actually landed on the soil of India and took up permanent residence therein, he cannot be described as domiciled in India or even as a native Indian subject of His Majesty domiciled in India."

[Report: 1954 M.W.N. (S.C.) 999.]

viii.—Exemptions from and Restrictions upon Territorial Jurisdiction

(a) FOREIGN STATES

[*See also* PART II, STATES AS INTERNATIONAL PERSONS: A, II, Sovereignty and Independence: iii, Conduct of Foreign Relations. Conclusiveness of Statements of the Executive.]

Jurisdiction—Exemptions from—Foreign States—Proceedings *in rem* against Ship—Foreign State Not a Party—Alleged Interest in Ship—Whether Court May Inquire whether Alleged Interest Illusory or Manifestly Defective.

JUAN YSMAEL & CO. INC. *v.* GOVERNMENT OF THE REPUBLIC OF INDONESIA.

British Commonwealth, Judicial Committee of the Privy Council. October 7, 1954.

(Earl Jowitt, Lords Porter and Oaksey, Sir John Beaumont, and Mr. L. M. D. de Silva.)

THE FACTS.—This was an appeal from the Court of Appeal of Hong Kong (see *International Law Reports*, 1952, Case No. 94[1]).

The appellants, who were a company incorporated under the laws of the Philippine Islands, had issued a writ *in rem* against the steamship *Tasikmalaja*, asking that they as owners of the vessel should have legal possession of her decreed to them. An appearance to the writ, under protest, was entered by the Government of Indonesia, without prejudice to an application to dismiss the action. Later, the Government of Indonesia entered a motion for an order to set aside the writ on the ground that it impleaded a foreign sovereign State, and that the Government of Indonesia was owner of the vessel by buying it from an agent of the appellant company, one Starr, or was in possession or control, and entitled to possession of the vessel.

Affidavits to support the motion were sworn by, among others, Kwee Djie Hoo, described as Consul-General for the Government of Indonesia at Hong Kong, and Pamoe Rahardjo, described as a Major in the Indonesian Army. The appellants applied for, and were given leave to cross examine these deponents after the Indonesian Government had unsuccessfully claimed that they were entitled to diplomatic privilege. The deponents failed to appear for cross examination and their affidavits were then removed from the file.

On September 15, 1952, Reece J. gave judgment dismissing the Government of Indonesia's motion claiming immunity from suit, and on October 24, in the trial of the action, he decreed possession of the vessel to the appellants, subject to a charge in a third party who had done work on the vessel. The Indonesian Government appealed. The Court of Appeal rescinded the judgment of Reece J. and ordered the writ to be set aside on the ground that it impleaded the Government of Indonesia, a foreign sovereign State.

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[1] *Sub nom. Juan Ysmael & Co.* v. *S.S. Tasikmalaja.*

The Company now appealed to the Judicial Committee.

Held: that the appeal should be allowed, and the judgment of the Hong Kong Court of Appeal set aside. Where, in proceedings in respect of property, a foreign sovereign Government claimed that it was indirectly impleaded in an action to which it was not a party, it was not bound as a condition of obtaining immunity to prove its title to the interest claimed; but it was required to produce evidence to satisfy the Court that its claim was not merely illusory, nor founded on a title manifestly defective.

The judgment of their Lordships was delivered by Earl Jowitt, who stated the facts, and continued: "The rule according to a foreign sovereign government immunity against being sued has been considered and applied in many cases. The basis of the rule is that it is beneath the dignity of a foreign sovereign government to submit to the jurisdiction of an alien court, and that no government should be faced with the alternative of either submitting to such indignity or losing its property. The rule was stated by Lord Atkin in the case of *The Cristina* [1938] A.C. 485, 490,[1] as involving two propositions. The first, that the courts of a country cannot implead a foreign sovereign; and the second, that they would not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control. Dicey, 6th ed., p. 131, in a passage in his "Conflict of Laws" approved by Lord Radcliffe in the case of *Dollfus Mieg*,[2] stated the rule in these terms: 'The court has . . . no jurisdiction to entertain an action or proceeding against (1) any foreign sovereign . . . Any action or proceeding against the property of [a foreign sovereign] is an action or proceeding against such person.'

"In whichever way the rule is stated it is apparent that difficulty may arise in the application of the second branch of it. Where the foreign sovereign State is directly impleaded the writ will be set aside, but where the foreign sovereign State is not a party to the proceedings, but claims that it is interested in the property to which the action relates and is therefore indirectly impleaded, a difficult question arises as to how far the foreign sovereign government must go in establishing its right to the interest claimed. Plainly if the foreign government is required as a condition of obtaining immunity to prove its title to the property in question the immunity ceases to be of any practical effect. The difficulty was cogently expressed by Lord Radcliffe in the case of the *Dollfus Mieg*, where he said: [1952]

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[1] [See *Annual Digest*, 1938–1940, Case No. 56.]

[2] [See *International Law Reports*, 1952, Case No. 37.]

A.C. 582, 616, 'a stay of proceedings on the ground of immunity has normally to be granted or refused at a stage in the action when interests are claimed but not established, and indeed to require him [*i.e.*, the foreign sovereign] to establish his interest before the court (which may involve the court's denial of his claim) is to do the very thing which the general principle requires that our courts should not do.'

"In the case of *The Jupiter* [1924] P. 236,[1] where the writ was *in rem* against the ship, Scrutton L.J. based his judgment on the view that an assertion by a foreign sovereign that he claimed a right in property must be accepted by the court as conclusive without investigating whether the claim be good or bad. The Lord Justice concluded his judgment by saying 'I am content to rest my decision in this case on the fact that this writ requires a foreign sovereign to appear in these courts to defend what he alleges to be his property, and by the principles of international comity the courts of this kingdom do not allow such steps to be taken against foreign sovereigns.' The view that a bare assertion by a foreign government of its claim is sufficient has the advantage of being logical and simple in application, but it may lead to a very grave injustice if the claim asserted by the foreign government is in fact not maintainable, and the view of Scrutton L.J. has not found favour in subsequent cases.

"In the case of *The Cristina* [1938] A.C. 485, the action was commenced by a writ *in rem* against the ship, and the foreign government which sought to have the writ set aside claimed to be in possession of the ship. Lord Wright, in his speech, noted that the fact of possession was proved, and he added: 'It is unnecessary here to consider whether the court would act conclusively on a bare assertion by the government that the vessel is in its possession. I should hesitate as at present advised so to hold, but the respondent here has established the necessary facts by evidence.' Lord Maugham in his speech dealt with the matter at more length and expressed the view that: 'There is, I think, neither principle nor any authority binding this House to support the view that the mere claim by a government or an ambassador or by one of his servants would be sufficient to bar the jurisdiction of the court, except in such cases as ships of war or other notoriously public vessels or other public property belonging to the State.'

"In *Haile Selassie* v. *Cable and Wireless Ltd.* [1938] Ch. 839[2] the plaintiff sued for a debt and a foreign government claimed that it was entitled to the debt, and claimed to have the action stayed, but the foreign government took no part in the proceedings and the Court of Appeal in those circumstances refused to stay the action, accepting the view expressed by Lord Maugham in *The Cristina* case that a mere claim by the foreign government is not enough.

[[1] See *Annual Digest*, 1925–1926, Case No. 100.]
[[2] *Ibid.*, 1938–1940, Case No. 67.]

In the case of *The Arantzazu Mendi* [1939] P. 37, [1939] A.C. 256,[1] the writ was *in rem* claiming possession of the vessel. A foreign government entered appearance under protest and claimed to set aside the writ on the ground that the action impleaded a foreign sovereign State. In the Court of Appeal it was held that the foreign government was entitled neither to the ownership nor possession of the ship, but that it had proved that it had requisitioned the ship, and that the master and owners had recognized such requisition. The court held that this showed a sufficient interest in the foreign government to involve that it was impleaded by the writ, and accordingly the writ was set aside. Goddard L.J., as he then was, expressed the view on the authority of *The Cristina* and *Haile Selassie* cases that where a claim for immunity is made by a foreign sovereign it is not enough that his claim should be a bare assertion of right or a mere claim, and the Lord Justice continued: ' But if the court can see that the question that arises is a question of competing rights, as in this case here, where we have got the fact that the owners of the ship admittedly have purported to give to the foreign sovereign who is claiming immunity rights over the ship—it may be that those rights are good or it may be they are bad, that is just what we cannot try—but if they purport to give rights over their ship and therefore there is more than a mere claim, and there is evidence before the court on which it can be shown that the question which is to be decided in the case is competing rights, then it appears to me the principle of immunity applies.'

" In the House of Lords the view was taken that the foreign government has proved that it was in possession of the vessel and the case therefore was similar to that of *The Cristina*.

" In the *Dollfus Mieg* case [1952] A.C. 582, the plaintiffs claimed from the Bank of England 64 gold bars which the bank held as bailee. Certain foreign governments sought to stay the action on the ground that they were the owners of the bars. The action was stayed as to 51 bars, it having been discovered after the hearing in the court of first instance that the bank had inadvertently parted with 13 of the bars. Their Lordships think it clear that the House of Lords considered the evidence relating to the claim of the foreign governments since most of the learned Lords expressed the view that there should have been more adequate discovery, which would only have been important to enable the court to ascertain all the relevant facts.

" In their Lordships' opinion the view of Scrutton L.J. that a mere assertion of a claim by a foreign government to property the subject of an action compels the court to stay the action and decline jurisdiction is against the weight of authority, and cannot be supported in principle. In their Lordships' opinion a foreign government claiming that its interest in property will be affected by the judgment in an action to which it is not a party, is not bound as a condition of obtaining immunity to prove its title to the interest claimed, but it must produce evidence to satisfy the court that its claim is not merely illusory, nor founded on a title manifestly defective. The court must be satisfied that conflicting rights have to be decided in relation to the foreign government's claim. When the court reaches that point it must decline to decide the rights and must stay the action, but it ought not to stay the action before that point is reached. It remains to apply this principle to the facts of the present case.

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[1] [See *Annual Digest*, 1938–1940, Case No. 25.]

" The steamship *Tasikmalaja* was registered on the Panamanian registry. It was acquired by the appellants in the year 1950, and from 1951 onwards was chartered by the appellants to the Government of Indonesia under successive charterparties, the last of which was due to expire on June 30, 1952, three days after the issue of the writ. The vessel was used by the Government of Indonesia for carrying troops, so that the question raised in some of the cases whether a right of immunity can be claimed for a ship used by the foreign government solely for commercial purposes does not arise. The only charterparty produced in evidence is that of January 1, 1951, which was made by Frank Starr as lawful attorney for the appellants, and under it possession of the vessel did not pass to the government. The last charterparty, due to expire on June 30, 1952, has not been produced, and there is no evidence that under it the Government of Indonesia acquired possession of the vessel, nor indeed has it been so claimed in argument. The power of attorney in favour of Starr, which is in evidence, is exhibit AR-1. It is dated November 8, 1950, and constitutes Starr the attorney of the appellants to sell the steamship *Tasikmalaja* for any sum of money or other consideration as to him may seem most advantageous and beneficial to the appellants. The power of attorney was signed on behalf of the appellants by K. H. Hemady as president and general manager. There is some evidence that the power was void under the law of the Philippine Islands, but this matter has not been fully investigated and their Lordships will assume that the power was valid. On January 10, 1952, Hemady wrote to Major Pamoe saying that if the government bought the *Tasikmalaja* there should be no deduction from $450,000 in respect of money paid to Starr on account. In his reply of January, 1952, Major Pamoe wrote to Hemady a letter in which he said: ' We have chartered the *Tasik*, for six months more until June this year with option to buy the vessel. The purchase price of the vessel will be applied to the charter price of the six months of last year. This contract is settled down already and we agreed. We can and dared to do this because Mr. Starr has the full power of attorney from your company to charter or to purchase the vessel.'

" After receipt of this letter, on February 6, 1953, Hemady cabled to Major Pamoe: ' We do not agree to deduct any charter money from purchase price *Tasikmalaja*. Starr inquired and we answered negatively.' This cable was confirmed by letter to Major Pamoe the next day, and on the same day, February 7, Hemady wrote to Starr setting out a copy of the cable sent to Major Pamoe. In spite of these instructions and in complete disregard to them, Major Pamoe and Starr entered into an agreement to sell the ship, and it has not been denied that moneys due under the charterparty were deducted from the purchase money. It appears from the printed case of the Government of Indonesia that the contract for sale was entered into on February 13, 1952, the contract price being U.S. $70,000, and that the sale was completed by bill of sale dated March 17, 1952. The bill of sale is not in evidence, but presumably further particulars of the transaction were contained in the evidence of the respondents which has been struck out. As from the date of the alleged sale the Government of Indonesia have claimed to be owners of the vessel, and have taken various steps to implement their title, including registering the vessel on the Indonesian register and changing the flag from Panamanian to Indonesian. On March 13, 1952, the vessel was brought by the Government of Indonesia to Hong Kong and was delivered for repair to the Hong Kong and Whampoa Dock Co. Ltd., in whose dock the ship was at the time of the issue of the writ. The government claims to have paid large sums to the Dock Company for work done on the vessel. The ship, however, has always remained in the legal possession of the appellants through the acting captain, Jose Silos. On June 30, 1952, the Consul General for the Government of Indonesia at Hong Kong by letter purported to dismiss Silos, but Silos in his answer of the same day refused to accept such dismissal. Their Lordships are satisfied that Silos, as acting captain of the *Tasikmalaja*, has always remained, as he claims in his affidavit, the servant of the appellants, and that legal possession of the vessel never passed to the Government of Indonesia. This, indeed, was not disputed in the argument before their Lordships' Board.

" The result appears to be this. The charterparty under which the Government of Indonesia had control of the vessel expired on June 30, 1952, at the latest, even if it had not been previously repudiated. At the date when immunity was claimed by the Government of Indonesia, namely, July 9, 1952, which is the date on which the validity of the claim first fell to be considered, the Government of Indonesia had no interest whatever in the vessel except such as arose under the alleged purchase of February 13, 1952. The negotiations for the sale and purchase of the ship were conducted between Starr and Major Pamoe. Starr was purporting to act as agent of the appellants as sellers and Major Pamoe as agent for the Government of Indonesia as purchasers. In fact, Starr had no authority to sell the ship on the terms specified in the agreement of sale, and Major Pamoe was fully aware that he had no such authority. However wide the powers originally given to Starr may have been, it is clear that they could be withdrawn or modified by the appellants. The cable and letters of February 6 and 7, 1952, from Hemady to Starr and Major Pamoe make it clear that the vessel could only be sold on certain conditions, and Starr and Major Pamoe subsequently purported to agree to a sale of the ship in complete disregard of these conditions. The evidence in the record of their title to the ship set up by the Government of Indonesia appears therefore to their Lordships to be manifestly defective, since even if Major Pamoe did not disclose the position to his employers, the Government of Indonesia, yet he was the agent of that government in carrying out the purchase, and his knowledge must be attributed to the government. For these reasons their Lordships think that the Government of Indonesia have not established that they possess such an interest in the steamship *Tasikmalaja* as would show that they were impleaded. Accordingly, there is no ground for setting the writ aside.

" Their Lordships will therefore humbly advise Her Majesty that this appeal be allowed, that the judgment of the Appeal Court in Hong Kong dated December 13, 1952, be set aside, including the declaration that the judgment of Reece J., dated October 24, 1952, was null and void for want of jurisdiction, and that the matter be remitted to the Appeal Court to consider the other questions raised in the appeal. All costs incurred in the courts in Hong Kong shall be dealt with by the Appeal Court. The respondents must pay the costs of the appeal to their Lordships' Board."

[Report: L.R. [1955] A.C 72.]

Jurisdiction—Exemptions from—Foreign States—*Acta jure gestionis*—Infringement of Local Legislation—Whether Goods Subject of Infringement and Owned by Foreign State Liable to Confiscation.

SOVIET DISTILLERY IN AUSTRIA CASE.[1]

Austria, Administrative Court. January 13, 1954.

THE FACTS.—Large quantities of spirits produced in a distillery under the management of the Soviet army of occupation in Austria found their way from the Soviet Zone of Occupation (in Austria) into the British Zone of Occupation, where they were confiscated in pursuance of an Austrian Law which provided that spirits not delivered to the competent Austrian authorities administering the State monopoly in spirits were subject to confiscation. It was found as a fact that an employee of the Soviet distillery had stolen the spirits, and that an intermediary had taken them to the British Zone of Occupation with a view to selling them there. The Soviet authorities appealed against the confiscation, contending—as far as here material—that property owned by the Soviet Union, a foreign State, was not liable to confiscation. The Austrian authority which had confiscated the spirits contended that the spirits were goods which had come into existence as a result of and in connection with the commercial—as distinct from the sovereign—activities of the Soviet Union, and that the confiscation was therefore lawful.

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[1] The Austrian report refers to this case under the name of *Union der Sozialistischen Sowjetrepubliken, Guts- und Forstverwaltung, Gruppe Markt-Neuhodis* v. *Finanzlandesdirektion für Steiermark.*

Held: that, just as there was no generally recognized rule of international law which exempted foreign States from the jurisdiction of the local courts in so far as their commercial activities were concerned, so there was no rule which exempted from confiscation property owned by a foreign State which had come into existence as a result of the commercial activities of that State; but that, as on the facts the Soviet authorities had not been given sufficient opportunity to prove that the spirits had been stolen without any negligence on their part, the proceedings were defective, and accordingly the order confiscating the spirits must be quashed.

The Court said: "The complainant contends that by reason of its exterritoriality the confiscation lacks validity. Exterritoriality is a concept of international law, and the generally recognized rules of international law are, according to Article 9 of the Constitution, an integral part of federal law. It is true that according to the generally recognized rules of international law foreign States are not subject to the jurisdiction of the local courts or administrative authorities when they act in their sovereign capacity. On the other hand, neither the doctrine of international law, nor the practice of States, nor again the jurisprudence of the State organs of the members of the community of States, recognizes a general principle to the effect that a foreign State acting in a private capacity, and more especially conducting a business enterprise, is exempt from local jurisdiction in regard to matters arising in that capacity or out of the conduct of business enterprises. The Supreme Court has accordingly held[1]—having carefully considered the doctrine and jurisprudence of various countries—that foreign States are exempt from local jurisdiction, according to international law, only in respect of acts undertaken in the exercise of their sovereign powers. Notwithstanding that the sources referred to in this decision of the Supreme Court make reference only to local jurisdiction, the same rule must apply to the exercise of administrative functions. Accordinly, where Austrian law has been infringed in connection with the

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[[1] Reference was here made to the judgment of the Austrian Supreme Court of May 10, 1950, in *Dralle* v. *Republic of Czechoslovakia: International Law Reports*, 1950, Case No. 41.]

commercial activities of a foreign Power in Austria, and where such infringement must result in the confiscation of specified property, the foreign State owning such property is not entitled to invoke its exterritoriality against a decree ordering the confiscation."

[Report: VwGH (F), 9 (1954), p. 5.]

Jurisdiction—Exemptions from—Foreign States—Action against Foreign Military Authorities to Recover Confiscated Military Scrip—Foreign State as Real Party in Interest.

JOHNSON *v.* MAJOR-GENERAL HOWARD M. TURNER *ET AL.*

Philippines, Supreme Court. April 26, 1954.

THE FACTS.—On August 5, 1950, the plaintiff resigned his position as a civilian employee of the United States Army on Okinawa Island and returned to the Philippines. Although military regulations required that persons leaving military installations surrender the Military Payment Certificates (scrip money) used for making tax-free purchases within the installations, the plaintiff retained $3,713.00 in such certificates. Several months later, when the plaintiff attempted to convert the certificates into dollars at the United States Military Port of Manila, the certificates were confiscated by the Provost Marshal of the Port. Shortly thereafter, the United States Army ordered the conversion of all existing certificates into a new series of certificates and declared the old series worthless.

The plaintiff brought this action in the Court of First Instance of Manila to recover new certificates of the same value as those confiscated. The defendants moved for dismissal on the ground that they were officers of the United States Army acting in their official capacities. The trial Court held that the action was one for the recovery of the plaintiff's certificates rather than for a sum of money as damages, and that the action accordingly was not against the United States Government. Judgment was given for the plaintiff, and the defendants appealed.

Held: that the decision of the Court below must be reversed. The action was actually for the recovery of new certificates rather than of the certificates confiscated by the defendants. If the relief was to be of any benefit to the plaintiff, it would have to be given in dollars, and thus would be a charge against the United States. Such an action could not be maintained against a foreign Government without its consent.

The Court said: " Believing that the main and most important question involved in the appeal is that of jurisdiction, we shall confine our considerations to the same. In the case of *Syquia* v. *Lopez et Al.*, 47 O.G. 665,[1] where an action was brought against

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[1] See *International Law Reports*, 1951, Case No. 55.]

U.S. Army officers not only for the recovery of possession of certain apartments occupied by military personnel under a contract of lease, but also to collect back rents and rents at increased rates including damages, we held: [The Court here quoted from that case.] In the present case, if the action were merely for the return of the scrip money confiscated from plaintiff Johnson, it might yet be said that the action was for the recovery of property illegally withheld by officers and agents of a government professing to have acted as its agents. However, as already stated, the present action is for the recovery not of the very scrip money confiscated but for the amount of said scrip in the new series of military payment certificates, and this was the relief granted by the lower court. Furthermore, if the relief is to be of any benefit to plaintiff and since he has already lost his authorized status to possess and use said scrip money, he will have to be given the equivalent of said scrip money in dollars. It is, therefore, evident that the claim and the judgment will be a charge against and a financial liability to the United States Government because the defendants had undoubtedly acted in their official capacities as agents of said Government, to say nothing of the fact that said defendants had long left the Philippines possibly for other assignments; that was the reason the decision appealed from directs the return of the scrip money by the defendants *or their successors*. Consequently, the present suit should be regarded as an action against the United States Government.

" It is not disputed that the United States Government has not given its consent to be sued. Therefore, the suit cannot be entertained by the trial court for lack of jurisdiction.

" Another point may be mentioned, though incidentally, namely, that before the decision was rendered by the lower court the plaintiff filed his claim for the same amount of $3,713.00 with the Claims Division, General Accounting Office, Washington, D.C. However, the record fails to show the action taken, if any, on said claim.

" In conclusion, we find and hold that the present action because of its nature is really a suit against the Government of the United States, and because said Government has not given its consent thereto, the courts, particularly the trial court, have no jurisdiction to entertain the same. Because of this, we deem it unnecessary to discuss and rule upon the propriety and legality of the confiscation made by the defendants, particularly Capt. Wilford H. Hudson, of the scrip money from the plaintiff, and whether or not the latter's filing of his claim with the U.S. Government through its Claims Division, constitutes an abandonment of his claim or suit with the Philippine court."

[Reports: *Lawyers Journal*, 19 (1954), p. 284; *Decision Law Journal*, 10 (1954), p. 389.]

Jurisdiction—Immunity from—Action Calling in Question Propriety of Acts of Foreign State—Refusal to Pass Judgment on Acts Done by Foreign Government Within Its Own Territory.

See p. 16 *Frazier et Al.* v. *Foreign Bondholders Protective Council, Inc., et Al.*).

(c) PUBLIC SHIPS AND OTHER PROPERTY OF FOREIGN STATES.

Jurisdiction—Exemptions from—Foreign Government-Owned Vessels—Territorial Waters—Innocent Passage—Conditions of—War—Effect of Treaty of Peace—Instrument of Surrender of Japan—Effect on Jurisdiction of Japanese Courts—Effect of Treaty of Peace, 1951—*Postliminium.*

JAPAN *v.* KULIKOV.

Japan, District Court (Criminal Division) of Asahikawa.

(Yamaguchi, President ; Hoshimiya and Kanda JJ.

February 19, 1954.

THE FACTS.—The accused, a Russian national, was the captain of a patrol boat belonging to the Sakhalin Fishing Board and under the control of the East Sakhalin State Trust of the U.S.S.R. On August 1, 1953, he was with a crew of three on board the said patrol-boat in the port of Atolasov (formerly Chishiya), Sakhalin County, without a valid passport or seaman's book. He took a Japanese national, Sanjiro Seki, on board the patrol-boat in order to land him secretly on Hokkaido, in Japanese territory, at a place which was not a port. He entered Japanese territorial waters on August 2. On August 8, in Japanese territorial waters, he secretly took the said Sanjiro Seki on board to take him back to Sakhalin County. The accused thus twice entered Japanese territorial waters.

The accused was charged with violation of the Immigration Control Order,[1] Article 4 of the Law No. 126 of 1952, and Articles 3 (1) and 23 of the Law of Ships.[2] For the defence, it was contended (a) that the Court had no jurisdiction over the accused, for two reasons. First, the Potsdam Declaration and the Instrument of Surrender were still effective between the U.S.S.R. and Japan. According to paragraph 6 of the Instrument of Surrender,[1] Japan was bound to carry out in good faith the directives of the Supreme Commander for the Allied Powers or of any other designated representative of the Allied Powers. As the U.S.S.R. was a designated representative of the Allied Powers, the Japanese Government was under an obligation to carry out any requirements of the representative of the U.S.S.R. In the present case, the Soviet Mission in Japan had twice, on August 19 and 31, 1953, given the Japanese Government notice to release the patrol-boat and crew at once, and the Japanese Government was bound to release them. Secondly, it was contended that the patrol-boat in question had exterritorial rights because it was a public vessel owned and operated by the Soviet Government. The Japanese Court, therefore, had no jurisdiction over the accused. (b) If the circumstances surrounding the said Sanjiro Seki [that he might have been a spy] were left out of consideration, the facts in the present case showed merely that the accused entered Japanese territorial waters, and the right of innocent passage is admitted in international law. Therefore, even if the above facts were true, they did not constitute an offence.

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[1] The Immigration Control Order provided:

" Article 3. Any alien who seeks to enter Japan shall be in possession of a valid passport or seaman's book."

" Article 70. Any person coming under one of the following categories shall be subjected to penal servitude or imprisonment for a period not exceeding three years or to a fine not exceeding one hundred thousand yen:

(1) A person who has entered Japan in violation of the provision of Article 3; . . ."

[2] The Law of Ships provided:

" Article 3. No vessel [etc.] owned or possessed by a person other than a Japanese national may touch at any closed port . . ."

" Article 23. Any captain who commits an offence under . . . Article 3 . . . hereof may be sentenced to penal servitude or imprisonment for a period not exceeding two years or a fine not exceeding one hundred thousand yen, and any vessel [etc.] owned or possessed by the captain may be confiscated."

Held: that the Court had jurisdiction. The accused was found guilty. He had " disturbed the fair and just control of entry into Japan ". Confiscation under Article 78 of the Immigration Control Order[2] of the patrol-boat with its accessories was not, however, ordered, because they were the property of the Soviet State, even though they were in the possession of the accused.

I. *Belligerent Occupation. After Unconditional Surrender.*—In regard to the jurisdiction of the Court over the accused, the Court said: " The authority of the Japanese Government to govern the State of Japan derives from the Instrument of Surrender of September 2, 1945, and was made provisionally subject to the supervision and control of the Supreme Commander for the Allied Powers, until such time as the irresponsible militarism of Japan was destroyed—in other words, until a new order of peace and justice was realized and Japan's war-making power destroyed. The occupation and control of Japan was generally executed through the existing

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[1] The Instrument of Surrender of September 2, 1945, provided:

§ 6. We hereby undertake for the Emperor, the Japanese Government and their successors to carry out the provisions of the Potsdam Declaration in good faith, and to issue whatever orders and take whatever action may be required by the Supreme Commander for the Allied Powers or by any other designated representative of the Allied Powers for the purpose of giving effect to that Declaration.

[2] Article 78 of the Immigration Control Order provided:

" Any vessel [etc.] employed in connection with an act which is an offence under Article 70, para. 1, which is owned or possessed by the offender may be confiscated."

Japanese governmental organs. General MacArthur, Supreme Commander for the Allied Powers, was their chief executive officer, who expressed the unified intentions of the Allied Powers concerning the carrying out of Japan's responsibilities (see para. 3 of the Notification of the United States Government of August 14, 1945, to the Japanese Government of Acceptance of the Surrender Offer, and Surrender Orders.[1]

" Unlike the judicial powers enjoyed under the old Consular Jurisdiction Treaties, the scope of Japan's judicial power, which is a power to rule the State, was limited to measures taken by the Supreme Commander for the Allied Powers to carry out the objects of the occupation. The judicial power being under Japanese municipal law quite independent in its character from the executive power, the judiciary was not under the direction and control of the executive branch. Consequently, by the Memorandum of February 19, 1946, on the Exercise of Criminal Jurisdiction,[2] issued as a definitive measure concerning Japan's judicial power, Japan's criminal jurisdiction over United Nations nationals was withdrawn and transferred to the Allied Powers. But, in the course of the occupation and control of Japan, the limitations on Japan's criminal jurisdiction were eased, and by the Memorandum of October 18, 1950, on the Exercise of Civil and Criminal Jurisdiction, the Japanese courts regained the right to exercise criminal jurisdiction over all

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[1] The Notification provided:

" § 3. For the purpose of receiving such surrender and carrying it into effect, General of the Army Douglas MacArthur has been designated as the Supreme Commander for the Allied Powers, and he will notify the Japanese Government of the time, place and other details of the formal surrender."

[2] The Memorandum provided:

" 1. The Japanese courts will henceforth exercise no criminal jurisdiction over United Nations Nationals or organizations, including corporations. All pending criminal proceedings in which Nationals of the United Nations are defendants will be reported to this headquarters; further action by Japanese courts with respect to such defendants will be stayed; and the defendants will be held subject to directions from authorized representatives of the Supreme Commander for the Allied Powers.

. . . .

" 4. The Commanding General of the Eighth Army and the Commander, Fifth Fleet, have been directed to appoint military occupation courts including commissions and provost courts with jurisdiction over the foregoing persons and offences.

. . . .

" 6. The Imperial Japanese Government shall have no authority to arrest United Nations Nationals, except (a) in areas where Allied troops are not actually present on duty and there is a reasonable suspicion that a serious crime has been committed by a United Nations National, or (b) when otherwise directed by the Supreme Commander for the Allied Powers or his authorized subordinates: provided that, when such persons are taken into custody, the apprehending authority will immediately report the incident to the nearest Allied Military Authority and deliver such persons upon instructions from such Authority.

" 7. The Japanese people and all other persons in Japan will be informed of this directive."

United Nations nationals in Japan[1] except those who were designated as Occupation Forces personnel. This ruling was effective with respect to all the Member countries of the United Nations. Thus Japan may duly claim this jurisdiction.

" Moreover, as the result of the recognition of the destruction of Japan's irresponsible militarism, the Treaty of Peace between the United States, Great Britain and many other States among the Allied Powers, and Japan, came into force between Japan and those States on April 28, 1952, replacing the Instrument of Surrender. Thus the occupation of Japan by the Allied Forces and the authority of the chief executive officer, the Supreme Commander for the Allied Powers, which had continued for six years and eight months, were finally terminated.

" The Court will now consider the relation of the Instrument of Surrender to the U.S.S.R. and China. Japan's duties, under the Instrument of Surrender, to each State, which do not require the unified intent of the Allied Nations according to the Potsdam Declaration (for example, with regard to such matters as the immediate cessation of hostilities, namely, the agreement to end the war, or the complete disarming of the Japanese military forces and the returning them to their homes with the opportunity to lead a peaceful and productive life), are naturally effective between Japan and the U.S.S.R. and China. Moreover, not only have Japan's duties under paragraph 6 of the Instrument of Surrender already been discharged, but the fundamental premise for discharging her duties with respect to the Allied Powers, namely, the existence of a unified intention among the Allied Nations, as formally expressed in the existence of the Supreme Commander for the Allied Powers, has also ceased to be. Therefore, the Instrument of Surrender has ceased to have effect in any regard.

" After the Treaty of Peace, Japan ceased to be under any obligation, under the above-mentioned provision of paragraph 6, to any of the Allied Powers; she regained sovereignty over a limited territory, including the islands of Honshu, Hokkaido, Kyushi, Shikoku and others; and the Japanese Constitution became the supreme law of the land. Therefore, there is no restriction upon the jurisdiction of the Japanese courts over the accused.

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[1] The Memorandum provided:

" 1. *Criminal Jurisdiction over Persons in Japan.* Japanese courts will henceforth exercise criminal jurisdiction over all nationals of Members of the United Nations (hereinafter referred to as United Nations nationals) in Japan except for the following, designated as occupation personnel:

a. Members of the armed forces of any Member of the United Nations;

b. United Nations nationals officially attached to or accompanying and in the service of the occupation forces;

c. United Nations nationals on official business in Japan;

d. Members of the immediate families and dependents accompanying the above."

"Counsel for the defence has argued that the Soviet Mission in Japan was '[an]other designated representative of the Allied Powers' stipulated in paragraph 6 of the Instrument of Surrender. But Japan's obligations under that paragraph of the Instrument are, for the reasons mentioned above, no longer binding. Moreover, the words 'other designated representative of the Allied Powers' quoted by counsel for the defence refer to a person in the position of the Supreme Commander for the Allied Powers, and the English text reads 'any other designated representative of the Allied Powers'. The adjective 'designated' qualifies 'representative' and the term 'Allied Powers' is plural in number and is qualified by a definite article. The true meaning of the foregoing phrase is, some person designated as the representative of all the Allied Powers. The same words, 'the Allied Powers', are used with reference to the Supreme Commander. The Soviet Mission in Japan was not a designated representative of all the United Nations to carry out the provisions of the Potsdam Declaration, but was sent to the Supreme Commander, as representing the U.S.S.R. as a member of the Allied Council, a consultative body for the Supreme Commander for the Allied Powers during the period of occupation. Therefore, even though, as alleged by counsel for the defence, notice was given to the Japanese Government by the Soviet Mission, the Japanese court was not deprived of its jurisdiction over the accused by such notification."

II. *Jurisdiction Over Foreign State-Owned Vessels.*—As regards the contention that the patrol-boat was a public vessel, the Court examined, *inter alia*, the boat's log book certificate and crew list, and found as follows: "In the U.S.S.R., the economic basis of the country is socialistic ownership, and consequently all properties are nationalized and each property is controlled separately by a State organ or administrative body. Each industrial enterprise is systematically organized. In the case of control by a trust created by a Ministry, which is the system involved here, the system consists of a general board, a trust, and an enterprise. The trust is given a juridical personality as an economic unit functioning on a self-supporting basis, and the director of the trust is appointed by the appropriate Ministry. In other words, the trust is an independent corporation authorized by a special memorandum of association or by special provisions having no connection with the State Treasury with respect to budgetary procedure or to the matter of the supply of funds. It administers and uses certain basic assets (properties which are excluded from private dealings) and current assets. It is held responsible for all the properties concerned except the basic assets. It directs activities on a lower level, acting under the direction of the higher economic administrative body which plans economic activities. The director of the trust carries out independently all the activities of the trust and is given the right to manage the business and administer the assets under his control. Thus, the East Sakhalin State Fishing Trust, under the Sakhalin Fishing Board, is regarded as an intermediate governmental body in the Soviet economic administrative system, under the Ministry of Light Industry and Production of the U.S.S.R. Therefore, the patrol-boat in question may be regarded as a public ship owned by the Soviet Government which is made available to the director of the trust for transportation and liaison purposes with respect to economic administration and in the discharge of his duties of inspecting and giving instructions concerning fisheries, factories, fishing boats, etc., which are a part of the enterprise of the trust.

" Public ships are divided into two main classes—warships and other public ships. The inviolability and exterritoriality of warships are a well-recognized rule. But, as regards other public ships, the law and the practice of the various States are not necessarily in accord, and there are even some States in which the practice has not been consistent. Consequently, it can be said that international custom concerning such public ships has not yet been established.

" Moreover, according to the findings in the present case, the patrol-boat in question was not in Japanese territorial waters on any official business, but had clearly violated Japanese territorial waters contrary to Japanese law, in other words, the patrol-boat in question entered Japanese territorial waters to commit a crime. Therefore, the claims of the accused to exterritorial rights cannot be recognized. If it were to be admitted that public ships were entitled to exterritorial rights, it would be for the purpose of creating international good faith and friendship. Since the activities of the patrol-boat were contrary to that purpose, a refusal to recognize exterritorial rights with respect to it would not be contrary to international good faith and friendship. The Court therefore has the right to hear and determine charges against the accused, who was the captain of the patrol-boat in question."

III. *The Right of Innocent Passage.*—As to the argument that the accused was exercising the right of innocent passage, the Court said: " This contention cannot be accepted, for it is clear that facts proved other than those concerning the said Sanjiro Seki, are in themselves sufficient to constitute the offence charged. This Court recognizes that the right of innocent passage is admitted in international law and applies to the passage of a merchant vessel through foreign territorial waters. However, such passage must not be injurious to, or threaten the interests of, the coastal States, or their peaceful order and security."

[Report: Unpublished.]

(d) FOREIGN ARMED FORCES.

Jurisdiction—Exemption from—Visiting Foreign Armed Forces—Immunity in Civil Matters—Whether Affiliation Order can be Enforced—Visiting Forces Act, 1933—United States of America (Visiting Forces) Order, 1942.

REGINA *v.* BIRKENHEAD BOROUGH JUSTICES, *Ex parte* SMITH.
England, Queen's Bench Division. February 9, 1954.
(Lord Goddard C.J., Cassels and Slade JJ.)

THE FACTS.—This was an application for an order of *mandamus*. In 1953, the applicant had obtained an affiliation order against Robert L. Warren, a soldier serving in the American forces in England. Payments under the order were at first made but then fell into arrears, whereupon the applicant applied to the Birkenhead Justices, under s. 64 (1) and s. 74 of the Magistrates' Courts Act, 1952, for the issue of a warrant to bring the American soldier before the court so that he might be committed for non-payment. The Magistrates, expressing doubts as to their jurisdiction, refused to issue a warrant, and the applicant then asked for an order of mandamus.

Held: that the United States of America (Visiting Forces) Order, 1942, extended to American soldiers serving in England the same privileges and immunities as were conferred by the Army Act, 1881, upon British soldiers. The justices, therefore, had no power to order the arrest of an American soldier for non-payment of money due under an affiliation order. Therefore the application must be refused.

Lord Goddard C.J. said: " The justices who heard this case were faced with a point which was novel to them because, although they no doubt knew that American soldiers could not be brought before English criminal courts, that is to say petty sessional courts sitting in a criminal capacity, they felt some difficulty about the extent of their powers in a quasi civil matter, for a bastardy order is a civil matter although it may be enforced by imprisonment.

" Accordingly we have to consider whether this is a case in which we should issue a mandamus. When the court is asked to issue an order of mandamus there is often more than one consideration: one is whether the court is entitled to issue mandamus; and another, subject to some limitations, is whether the court in the exercise of its discretion will issue a mandamus.

" First of all let us see what is the position in law. In 1942 the Visiting Forces Act, 1933, was applied by the United States of America (Visiting Forces) Order, 1942, to American forces then about to visit the country. The Order was made on May 22, 1942, and it will be remembered and must be a matter of common knowledge of which we should take judicial notice that the declaration of war against Japan, which led to the Americans entering the war, took place in December, 1941; and their forces began to arrive in this country in working parties to get ready for the larger numbers due to arrive in 1942. So his late Majesty was pleased to apply the provisions, or some of the provisions, of the Army Act to the American Forces, and he extended the Visiting Forces Act, 1933, to the United States of America.

" [His Lordship read Schedule II, paragraph (3) (b) (c) (d) and section 145 (1) of the Army Act and continued:] As I understand that, it seems to be perfectly clear that paragraph (3) (b) of the Order was intended to confer on American soldiers the same privileges or immunities as were conferred by the Army Act on British soldiers. The Army Act provides that the person or the pay of a British soldier cannot be taken in execution for the purpose of enforcing a bastardy order. Paragraph (3) of the Order in Council clearly extends that immunity to American soldiers. It would, therefore, seem to follow that if a court in this country is asked to make an order which can only result in commitments against an American soldier, the court would be right in refusing to do so because such an order would be contrary to the provisions of the Army Act, which has been extended to American soldiers.

" Mr. Cunningham, who has argued this case with great ability and has put before the court everything that can be said on behalf of his client—and of course we have every sympathy with women who have obtained orders which cannot be enforced—has called our attention to various other matters and, in particular, to the following words of paragraph (d) in the Order in Council, ' imposes upon any person . . . obligations in relation to the home forces, or any of them, or any member or service court thereof,' and suggests that that, read together with section 145 (2) of the Army Act, imposes a duty upon the American Army authorities to deduct from the pay of the soldier some amount towards the payment of this bastardy order. [His Lordship read section 145 (2) and continued:] Any opinion we were to give upon that proposition would be obiter because what we are asked for is the issue of a warrant against the man; but I should be very sorry to think that we should have to construe this legislation to mean that his late Majesty in Council was purporting to impose a duty upon the American Command to make deductions from their soldiers' pay. That must be a matter for the American Government to consider if they choose to do so. Apparently the American army authorities did at one time make such deductions but now, as the Attorney-General has told us, this procedure has been changed. That is entirely a matter for the authorities concerned. We cannot construe this Order as providing that there is an obligation upon the American Army authorities to make deductions from service pay and if there were, the present procedure would not be the proper means of enforcing it. I do not think that Mr. Cunningham was suggesting that, but rather that, as such deductions were not being made from service pay, therefore, the remedy in the courts of law must be open to the applicant. I am afraid I cannot agree to that. There is an absolute prohibition from taking a man in execution so long as he is a member of the American Forces.

" The justices at Birkenhead were, therefore, justified, on being told that this man was an American soldier and that the application was being made to them on the footing that he was an American soldier, in refusing to issue their warrant, and this court will not order them to do otherwise.

" If, on the other hand, it was put that the justices at Birkenhead ought to have taken the view that the defendant was a civilian, the affidavits which have been filed in this court exhibit letters from the American Army authorities stating that he has gone abroad. Nobody has contradicted that, and although the letters relied on may not be strictly evidence there seems to be no doubt, if we look at the realities of the situation, that the man has gone abroad. I cannot, therefore, see what use it would be at the present time for the applicant to have an order, because if the justices did issue their warrant there would be no means of serving the defendant in America and no means of issuing execution upon him in America. He is not extraditable from America. Should he return to this country as a civilian the applicant would then be able to take proceedings against him. It is some satisfaction to hear from the Attorney-General that this matter is engaging the attention of Her Majesty's Government and it may be when the Visiting Forces Act, 1952, comes into operation some reciprocal arrangement will be made under which these bastardy orders may be enforced against either American soldiers or those who have been American soldiers. We cannot speculate on that.

" In this case I am satisfied that the justices were right in refusing the order and, therefore, this application fails and must be dismissed."

[Report: [1954] 1 W.L.R. 471.]

NOTE.—The position was changed by the Visiting Forces Act, 1952, whereby affiliation orders made against members of visiting forces to which the Act applies, are enforceable against them in the United Kingdom by the normal processes of law, including committal to prison.

Jurisdiction — Exemptions from — Foreign Armed Forces — Position of—Privileges of—United States Armed Forces in Newfoundland.

GALLANT *v.* WEST.

Canada, Supreme Court of Newfoundland. November 2, 1954.
(Durfied J.)

THE FACTS.—The United States Government have, under a Treaty, and for 99 years from 1941, a large Air Base in Newfoundland, employing large numbers of service men and civilians. The position under the Bases Agreement Acts is that the United States Military Authorities have exclusive possession and control within this Base, and have complete control over the comings and goings of their personnel whether within or without the Base. On the occasion of a visit to the Base by another squadron, Colonel West, the then Commandant of the Base, prepared a pamphlet welcoming the visitors and which was intended to acquaint them with local regulations, policies and customs. In this pamphlet was reproduced an order, made by a previous Commandant, which provided that a number of places in villages and towns within travelling distance of the Base were to be regarded as " out of bounds " to the men on the Base: included in these places was the bedroom part of the hotel of the plaintiff situated in a village adjoining the Base. The plaintiff claimed that this was a libel upon him by Colonel West, and asked for damages.

Held: that the action must be dismissed. Where an officer of the Armed Forces gives information to subordinates, in the communication of which both the officer and the subordinate have a common interest, the occasion is one of privilege; and where the Armed Forces of one State are present in another State by arrangement between the two States, and are under their own commands, they are entitled to be treated as if they were forces of the receiving State.

The Court said: " Points arise before the libel can go to the jury . . . First, as to the question of privilege . . . Qualified privilege arises where the person communicating the information and the person receiving the information have a common interest that it should be communicated and received, as, for example, . . . an officer of the Armed Forces, or of the State, to his subordinates . . .

" The general relationship of a Military Commander, who is charged with the welfare and discipline of his troops, to the troops themselves is such a relationship that he would certainly have qualified privilege when he either advises them or orders them that there are places to which he does not think it desirable for them to go. In such cases express malice must be shown,[1] and there is not a shred of evidence of express malice on the part of the military authorities . . .

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[1] *Semble*, in order to rebut the qualified privilege.

" The question however arises whether there is not merely qualified privilege but absolute privilege, in which case the motives of the officer making the eventual order would be quite irrelevant, as is said in the case of *Adam* v. *Ward*, [1917] A.C. 309, which is our latest authority. It is a part of public policy that the military should be able to give such orders amongst themselves as they think necessary for their own efficiency; and for the sake of public policy, this authority of theirs will not be interfered with. But in this particular instance, and this is the new and unusual situation, the matter goes further, because we are dealing with the Command of Foreign Forces visiting here in a friendly character and occupying an area exclusively reserved to themselves. In view of the general principles of the comity of nations, and of the attitude of nations to visiting Forces, indicated in such things as the N.A.T.O. Agreement which has been shown me, I think that organized foreign Forces under their own commands in this country by arrangement are entitled to be treated on the same footing as if they were our own Forces, Her Majesty's Forces; just as indeed under the Visiting Forces (North Atlantic Treaty) Act, 1951 (Can. 2nd Sess.), c. 28, there are special arrangements whereby members of visiting Forces are in some respects brought in by agreement under the law of the country which they visit.

" It seems to me therefore that insofar as the Commander of the American Bases, that is to say the former Commander, wrote these orders and communicated them to his own men within his Base, there cannot be said to be either libel at all or publication at all from the point of view of Canadian law. In other words, these are Acts of State, orders, not statements; and orders made in his unfettered discretion; and made within his own fences. Then he puts them on paper, which is about the only way to communicate them to some thousands of his subordinates. Then, by means which we do not know, some specimens of the publication are brought outside the Base and put in places where civilians may find them . . .

" It has been further asserted in evidence that this list of places declared out of bounds was posted up and is kept permanently posted up on all the bulletin boards which are placed in places where the troops gather . . .

" In these circumstances I have to decide, first, whether there is privilege qualified or absolute and, secondly, whether or not there has been excess of privilege.

" Now it must be remembered that the only way to communicate orders to thousands of men in the first place is to put them up in type or print, or to circulate them in detail. And so long as that is inside the Base nobody can question it. But we must ask ourselves whether we are asking the impossible of a Commander if we say it is his duty to see that no leaflet or pamphlet containing such an order gets outside the Base. This would seem to me to be asking a physical impossibility . . .

" I think, having regard to the fact that we are dealing with the official representatives of a foreign and friendly power in our midst, we must give them in a sense the benefit of the doubt by not asking for situations which are impossible and by presuming, and there is no evidence to the contrary but considerable evidence in its favour, that they went about the matter in a judicial and well-considered way, and not abruptly nor arbitrarily."

[Report: [1955] 1 D.L.R. 441.]

NOTE.—This decision was affirmed on appeal: see [1955] 3 D.L.R. 209.

Jurisdiction—Exemptions from—Foreign Military Mission—Mission Accredited to Allied Control Authority in Berlin.

HARTJE *v.* YUGOSLAV MILITARY MISSION AND ANOTHER.

Germany, United States Court of Appeals of the Allied High Commission for Germany. September 29, 1954.

THE FACTS.—The plaintiff, a German national, brought an action against the first defendants, the Yugoslav Military Mission accredited to the Allied Control Authority in Berlin, and the second defendant, the acting chief of the Mission, for certain sums of money allegedly constituting fees for the administration, and commission earned in connection with the purchase, of a building situate in Berlin and owned by the first defendants. On behalf of the defendants it was contended, in so far as concerned the first defendants, that they were immune from the jurisdiction of the Court on the ground that they were a mission of a foreign sovereign State accredited to the Allied Control Authority in Berlin and listed as such in the " official List " of such missions, and in so far as concerned the second defendant, that his name appeared in that list as the acting chief of the first defendants and that, in accordance with a letter of the United States High Commissioner for Germany, he was entitled, in that capacity, to those privileges and immunities which he would enjoy under German law. On behalf of the plaintiff it was contended, *inter alia*, that as the Government of Yugoslavia was represented in Germany by a diplomatic mission accredited to the Federal Republic of Germany, the first defendants were entitled only to exercise consular, and not diplomatic, functions in Berlin, and that they were accordingly not entitled to immunity from suit; and that, similarly, the second defendant, as acting chief of the first defendants, was not entitled to immunity from suit. It was further contended on her behalf that the first defendants had waived their immunity from suit in this Court by instituting proceedings against her in a German court.

Held: (i) that the first defendants were a duly accredited agency of the Government of Yugoslavia and as such entitled to immunity from suit;

(ii) that the second defendant's name appeared in the list of persons entitled to diplomatic status, and that this defendant had, in any event, acted in the performance of his official duties on behalf of the first defendants and was accordingly entitled to immunity from suit;

(iii) that the first defendants had not waived their immunity from the jurisdiction of a United States Court of the Allied High Commission by instituting proceedings in a German court.

The Court said: " A motion to dismiss for lack of jurisdiction was heard before the trial judge on February 27, 1954. After hearing testimony and receiving evidence, he granted the motion and directed the dismissal of the complaint against both defendants for want of jurisdiction. With respect to the Yugoslav Military Mission, he found that the Mission was accredited to the Allied Control Authority in Berlin, such fact appearing in the ' Official List of Military Missions Accredited to the Allied Control Authority in Berlin ' published on October 15, 1953. This list was received in evidence as Defendants' Exhibit No. 1. By reason of this learned trial judge held the mission to be a ' sovereign ' and, therefore, immune from suit, unless it voluntarily submits to the jurisdiction of the court. With respect to the individual defendant, the court found that the latter was Acting Chief of the Mission. Such finding was based upon testimony heard in court and the listing of the individual defendant as such in the aforesaid Official List. There was also testimony to the effect that he carried a diplomatic passport. In holding the individual defendant to be immune from suit, the learned trial judge relied upon a letter of the U.S. High Commission for Germany dated January 19, 1951 addressed to the Chief Justice of the U.S. Court of Appeals in Germany to the following effect:

> ' The Council of the Allied High Commission has determined that foreign diplomatic and consular representatives accredited to or recognized by the Allied High Commission or the Government of the Federal Republic of Germany are to be accorded appropriate privileges and immunities from the operation of the laws and courts of the Allied High Commission for Germany. It has been decided that the provisions of German law relating to the privileges and immunities of foreign diplomatic and consular representatives accredited to or recognized by the Federal Government shall receive, in respect of occupation law and courts, the same privileges and immunities to which such representatives are entitled under German law in regard to German law and courts. Similarly the privileges and immunities of foreign diplomatic and consular representatives accredited to or recognized by the Allied

High Commission rather than the Federal Government shall be, in regard to occupation law and courts, those privileges and immunities which such persons would enjoy under German law (in respect of German law and courts) if they were to possess a status in relation to the Federal Government similar to the status they possess in relation to the Allied High Commission.'

" The plaintiff, appealing from this order, claims that (1) both defendants are members of the Allied Forces, (2) by pleading to the merits, the defendants have waived their objection to the jurisdiction, (3) the defendants do not enjoy diplomatic immunity, and (4) the defendant, the Yugoslav Military Mission, has waived any immunity it may have possessed by suing the plaintiff. We shall deal with these assignments seriatim.

" I. *As to the first assignment of error:* There is no doubt that the defendants are members of the Allied Forces within the meaning of HICOG Law No. 20 and HICOM Law No. 2 (Allied Kommandatura Law No. 2), as the plaintiff contends. This, however, begs the question. The issue is not whether the defendants are members of the Allied Forces, but whether they enjoy immunity from suit by reason of their diplomatic or official status.

" II. *With respect to the second assignment of error:* We regard this to be without substance. In their answer the defendants specifically raised the jurisdictional question and, therefore, they cannot be deemed to have waived it. There is no provision for ' special appearance ' in our courts and under Article V and VI of Military Government Ordinance No. 33 a defendant has the option of raising his objections and defenses by answer or motion. This is similar to Rule No. 12 of the Federal Rules of Civil Procedure under which it has been held that such pleading does not constitute a waiver of a challenge to the court's jurisdiction over the defendant's person. At any rate, having failed to assert a waiver on the part of the defendants before the trial court when the motion to dismiss was argued, the plaintiff is foreclosed from raising such question now before this Court.

" III. *With respect to the third assignment of error:* (a) *As to the defendant Mission:* Whether the defendant Mission enjoys immunity from civil suit depends upon its status. There is no doubt that the Mission is accredited to the Allied Control Authority in Berlin as a ' diplomatic ' mission. This is evidenced by Defendants' Exhibit No. 1 and by the letter of the Assistant High Commissioner for Germany dated February 27, 1954, a true copy of which is attached to the brief of the Chief Attorney filed in this Court. Neither of these two documents is controverted by the plaintiff.

" The plaintiff argues that, since the Yugoslav Government already has an embassy in Mehlem accredited to the Federal Republic of Germany, the Military Mission which is accredited to the

Allied Control Authority in Berlin performs merely 'consular' functions and is, therefore, not entitled to diplomatic immunity. There appears to be no basis in fact or law for this argument. The record does not bear the plaintiff out. It is clear that the Federal Republic of Germany has no governmental authority over Berlin and that the Allied Control Authority, the Allied Kommandatura and the City Council and Senate are the only governing bodies in Berlin. Accordingly, the fact that Yugoslavia has an embassy accredited to the Federal Republic of Germany can have no bearing upon the functions and status of its military mission in Berlin which is accredited to another independent governmental authority and territory.

" But regardless of how the Mission may be characterized, there is no doubt that it is an 'agency' of the Government of Yugoslavia. As such it is entitled to sovereign immunity and may not be sued without its express consent. This is the law in the United States and England.

" The Italian case upon which the plaintiff relies[1] is not persuasive. Italy, unlike other countries, does not accept the general proposition that a state cannot be made a respondent in the courts of another state and has adopted a highly rigid application of the restrictive theory of sovereign immunity.

" The German courts, like those in the United States, have steadfastly adhered to the classical theory of sovereign immunity regardless of whether the litigation arose from acts accomplished *jure imperii* (sovereign or public acts) or *jure gestionis* (private or civil acts). They have granted agencies of the state the benefit of sovereign immunity as a matter of course because the real defendant is not the agency but the state itself. The only exception applies to litigation relating to the interests of a foreign sovereign in real estate situated in Germany. This exception would not apply to the case at bar which does not concern itself with title to, or possession of, real property, but seeks the recovery of damages for breach of contract. At any rate, since the law of the forum determines who may sue or be sued the American law is applicable.

" (b) *As to the individual defendant:* Insofar as the individual defendant is concerned, the plaintiff contends that the letter of the U.S. High Commissioner for Germany dated January 19, 1951 addressed to the Chief Justice of the U.S. Court of Appeals, upon which the learned trial judge relied, was never presented to the court or ever mentioned at the hearing. She further contends that the extract quoted by the learned trial judge in his opinion excludes Berlin but refers exclusively to diplomatic personnel accredited to the Allied High Commission or to the Government of the Federal Republic of Germany. She also argues that the language of the quotation would indicate that it refers only to criminal jurisdiction and that consuls are excluded from the purported protection of its provisions.

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[1] *Perrucchetti* v. *Puig y Casauranc* [see *Annual Digest*, 1927–1928, Cases No. 246 and 247].

" A search on our part has failed to discover the existence of the letter above referred to.

" The extract which the learned trial judge quoted would lead us to believe that the plaintiff is correct in her argument that the letter is inapplicable to Berlin and to the instant case. But it is unnecessary to rely upon this letter in order to reach the conclusion arrived at by the learned trial judge.

" The individual defendant is listed in Defendants' Exhibit No. 1 as the Acting Head of the Yugoslav Mission and has been certified by the Assistant High Commission to have diplomatic status. While the suggestion of the State Department to a court would ordinarily be sufficient to accord a defendant immunity from suit,[1] our action in this case need not be predicated on this alone.

" A reading of the complaint fails to reveal any allegation on the basis of which the liability of the individual defendant may be predicated. In paragraph 4 it is alleged that moneys were advanced to improve property owned by the Yugoslav Military Mission. In paragraph 5 it is alleged that the plaintiff acted as an agent and dealer for the purchase of this property by the Yugoslav Military Mission. The only basis for the assertion of a claim against the individual defendant is the allegation in paragraph 3 that he is the Chief of the Mission. We fail to see how these allegations state a cause of action against the individual defendant.

" But even if these allegations should be deemed to be sufficient or should be amplified to the point where they allege negotiations on his part or participation in the aforesaid transactions, it is clear that the acts complained of in this case arose in the course of the performance of official duties for the Yugoslav Government. Under the law of the United States, sovereign immunity applies to officials of the government of a foreign state when acting within the scope of their duties.

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[1] See *Schaffner* v. *International Refugee Organization*, XII Court of Appeals Reports 391. This procedure is frequently followed by courts in the United States in accepting the suggestion of the State Department in the determination of immunity. See *Exchange* v. *M'Fadden*, 7 Cranch (U.S.) 116, (1812); *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 34 (1944) [*Annual Digest*, 1943–1945, Case No. 39]. It is in the nature of a cooperative act, with the courts lending their power in recognition of their duty not to embarrass the government in its political affairs. See *United States* v. *Pink*, 315 U.S. 203, (1942) [*Annual Digest*, 1941–1942, Case No. 13]. Such practice is not necessarily inconsistent with the principle of judicial independence since our Courts have not regarded themselves compelled to follow the suggestion of the State Department, but have expressed their independent judgment in these cases, at times in opposition to the suggestion. See *Republic of Mexico* v. *Hoffman*, *supra*. It has been criticized, however, as tending to abridge the independence of the judiciary and to place upon it a moral and political burden which it should not bear. Cf. Shepard ' Sovereignty and State Owned Commercial Entities ' (1951), pp. 40–59; Jessup ' Has the Supreme Court Abdicated One of Its Functions ? ' 40 American Journal of International Law 168 (1946); *Matter of the United States of Mexico* v. *Schmuck*, 293 N.Y. 264 (1945) [*Annual Digest*, 1943–1954, Case No. 21]; *Schaffner* v. *International Refugee Organization* [see *International Law Reports*, 1951, Case No. 139], Clark, C.J., dissenting. In England the statement of the Secretary of State or of the Foreign Office on sovereign immunity is accepted as conclusive by the courts . . .

" While the German law on this point is not clear, it is the United States law that is controlling.

" IV. *With respect to the fourth assignment of error:* The law is clear that a sovereign may waive its immunity from suit by express consent, and a foreign state which institutes a suit in the courts of another state impliedly waives its immunity. The effect of such an implied waiver is to permit a defendant to bring a counterclaim against the foreign sovereign plaintiff. In the United States, as well as in Germany, the counterclaim or set-off must bear a definite relation to the original claims, i.e. it must arise out of the same transaction.

" The plaintiff concedes the foregoing to be the law and asserts that, by instituting an action in the German court against the plaintiff regarding these claims, the defendant Mission has waived its immunity. The fallacy of this argument is that such waiver would apply only in the German courts and would not extend to this Court which is another jurisdiction. By reason of such waiver the plaintiff would have a right to file a proper counterclaim in the German court against the Mission. The fact that the plaintiff has attempted to do so and that the German court has prohibited her from doing it is something that is not in the record or in the pleadings and, even if true, cannot be the concern of this Court. It certainly cannot serve to open this Court to the plaintiff as a forum for litigation against the Mission.

" The claim of waiver does not apply to the individual defendant who filed no suit in the German court.

" For the foregoing reasons leave to appeal is denied."

[Report: C.A.R. (U.S.), XX (1954/55), p. 197.]

Jurisdiction—Foreign Armed Forces—Claim in Respect of Injury to Member of National Armed Forces—United States Forces in Belgium.

OFFICE FOR MUTUAL AID (O.M.A.) *v.* VAN ANTWERPEN.

Belgium, Court of Cassation. October 7, 1954.

THE FACTS.—On January 19, 1946, one Van Antwerpen, a member of the Belgian armed forces, was killed in an automobile accident for which a member of the United States armed forces was responsible. His widow sued the Office for Mutual Aid for compensation. On April 30, 1953, the Court of Appeal of Brussels found in her favour. This was an appeal from that decision. It was contended on behalf of the Office for Mutual Aid that the respondent had already received a pension from the Belgian military authorities in respect of the death of her husband, and that she was not, under Belgian law, entitled to any further reparation. It was contended on behalf of the respondent that the relevant provision of Belgian law applied only to claims against the Belgian State, and that in this case compensation was not claimed from the Belgian State, but from the United States, whose obligations were performed by a Belgian organ, the Office for Mutual Aid, with funds specially provided for that purpose.

Held: that the appeal must be dismissed. There was nothing to indicate that it had ever been intended to deprive Belgian nationals of their legitimate claims against the United States or the United Kingdom.

The Court said: " The United States and the United Kingdom recognized, in particular in the Agreements signed with the Belgian Government on May 9, 1945, and January 26, 1945, their obligation to indemnify completely persons suffering injury or damage as a result of tortious acts of their agents and in particular of members of their armed forces on Belgian territory. The payment of such indemnities was first entrusted to military commissions set up by the two States concerned. Subsequently, by Decree-Laws of December 31, 1945, and January 11, 1947, the task was entrusted to the Office for Mutual Aid. That body, although created by the Belgian State, was responsible for the obligations, not of Belgium, but of the Allied States. It does not appear either from the text of the co-ordinated laws concerning pensions and compensation, or from the preparatory work relating thereto, that it was the intention of the Belgian Legislature to deprive Belgian nationals, even though they be members of the armed forces, of the full compensation to which they might be entitled from the United States or the United Kingdom and which was payable on behalf of those States by the Office for Mutual Aid."

[Report: *Pasicrisie belge*, 1955, I, p. 88.]

Jurisdiction—Exemptions from—Foreign Armed Forces—American Naval Mission to Greece.

AMERICAN MISSION TO GREECE (IMMUNITY) CASE.

Greece, Tribunal of First Instance of Athens. 1954.

(Saskellanon, President.)

THE FACTS.—By Article 5 of the Agreement signed on June 30, 1947, between Greece and the United States of America (ratified by Law No. 763 of 1948), by virtue of which the American Mission for Aid to Greece was instituted and began to function in Greece, the Greek Government assumed the obligation of affording to the Mission all the assistance possible in order to facilitate the accomplishment of its task, the movement of its personnel arriving in Greece, travelling about within Greece, and leaving Greece; the employment of persons of Greek nationality living in Greece; obtaining facilities and services; and the exercise of other activities of the Mission. It was further provided in the said Article that the personnel of the American Mission and its property, with that of its personnel, should enjoy in Greece the same privileges and fiscal exemptions as were enjoyed by the personnel of the American Embassy in Greece and its property and that of its personnel. The Greek Government had already, by Article 5 of the Agreement signed on July 8, 1944, at Athens between Greece and the United States of America (ratified by Law No. 764 of 1948), concerning aid for the relief of the Greek people by the United States, undertaken to assure the same privileges to the representatives of the United States, the property of the Mission and its personnel. In execution of the obligations assumed by the Governments under these Agreements, Law No. 644 of May 7/8, 1948, for the settlement of questions pertaining to the American Programme of Aid to Greece, was passed. Article 1 (3) (*a*) of that Law provides that the members of the personnel of the Mission (both civil and military, including the Corps of Engineers in Greece—Article 6 (2)) and their families, of foreign nationality and not permanently resident in Greece, shall enjoy immunity from jurisdiction (exemption from the jurisdiction of Greek civil and criminal courts) for acts and omissions committed by them both in the carrying out of their official duties and in their private lives.

" By an Accord on ' military facilities ' signed between Greece and the United States of America and brought into force by Decision No. 1006 of the Counsel of Ministers, dated October 12, 1953, it was provided that the provisions of Article 1 (3) (*a*) of Decree Law No. 694 of 1948 should apply also to that Accord.

" In the present case, proceedings were commenced against a member of the American Mission for Aid to Greece in respect of a misdemeanour (*obligation délictuelle*) alleged to have been committed by him. He claimed to be entitled to immunity from jurisdiction, both under Law No. 694 of 1948 and also as a member of the American Naval Mission in Greece.

Held: that the plea must fail. The privilege of immunity from jurisdiction did not apply to proceedings for a misdemeanour.

The Court said, referring to Article 1 (3) (*a*) of Law No. 694 of 1948: " It is indeed true that the legislator did not merely refer in a general way to the privilege of immunity from jurisdiction which the personnel of the Embassy of the United States enjoy in Greece, but it is also true that one cannot draw from the provisions of the Law, despite its wording, the conclusion that the legislator intended to accord to the personnel of the Mission a right or privilege of immunity wider in extent than that which is admitted in both international theory and practice in favour of ambassadors and other diplomatic representatives. The logical interpretation of the above-mentioned provision, founded on the special object of the Law, which was to fulfil the obligations undertaken by the Greek Government under the Accords mentioned . . . entirely negatives such an intention on the part of the legislator. The latter cannot of his own will have intended to accord to the above-mentioned persons a privilege wider in extent than that to which the Greek Government has contractually engaged itself, as already indicated, to assure to them, namely, the immunity from jurisdiction enjoyed by the personnel of embassies. Article 26 of the Code of Civil Procedure provides that ' all foreigners who enjoy in Greece the rights of ambassadors are exempt from ordinary procedure '. The accepted interpretation of this is that the rule of immunity from jurisdiction is not absolute; it is only general. In other words, it admits of necessary exemptions, determined on the basis of international law, of which it is a principle that immunity from jurisdiction does not extend in a general fashion to all the juridical relationships of diplomatic personnel. The latter are exempt from the jurisdiction of Greek courts, but only when it is a question of personal obligations assumed by them or moveable property owned by them in their official capacity and for their personal needs. They have, on the other hand, apart from special circumstances, no power to invoke immunity from jurisdiction in legal proceedings arising out of juridical relationships which are quite unconnected with the international representative character of persons entitled to immunity from jurisdiction. That opinion, which the Court adopts as being the most correct, is also accepted without reservation by all our writers on procedure (Euclide, *Interpretation of Penal Law*, Vol. A, § 57, n. 13, where misdemeanours are expressly mentioned; Economides, *Manual* (7th ed. by Lividas, 1934), vol. A, § 45, n. 3, where are also references to foreign writers who hold the same opinion; Potamianos, vol. B, § 618; Psarras, p. 173; Rammos, *Course of Civil Procedure*, 1937 edn., § 44, p. 79; Kitsipovlos, Art. 26, No. 6, B. See also Calvo, *Droit International Public*, trans. by Papafrango, p. 221; and the decisions of the Court of Appeal of Athens No. 223 of 1900 (Thémis, IX, p. 533) and 406 of 1903 (*ibid.*, XIV, p. 585), and of the Court of Appeal of the Aegean, No. 25 of 1926 (*ibid.*, XXXVII, p. 409)). In view of the foregoing, and seeing that the present action flows from an obligation which is unconnected with the duties and the public character of the defendant, the commencement of the proceedings against the latter before a Greek Court was in order and in conformity with the rules of jurisdiction. The circumstances mentioned above in which the immunity is not apposite are found in this case; the defendant's plea to the contrary must therefore be rejected. The same applies also to the similar plea raised by him and based upon his other capacity as a member of the American Naval Mission in Greece. The rule of immunity from civil jurisdiction which, according to a generally recognized principle of international law, is enjoyed also by foreign armed forces (armies, navies and air forces) present on the territory of a State with its consent (cf. Euclide, § 57, n. 12 (h) *in fine*, Economides-Lividas, § 45, n. 2) and that for the same reason as ambassadors, namely, that they shall not be hindered in the performance of their duties,—that rule is subject to the same exceptions as have been mentioned above. When the conditions of those exceptions are fulfilled, [members of foreign armed forces] cannot claim exemptions from the jurisdiction of the local courts."

[Report: *Revue Hellénique de Droit International*, 8 (1955), p. 309.]

II.—Personal

i.—Over Nationals in Respect of Crimes Committed Abroad

Jurisdiction—Over Nationals in Respect of Offences Committed Abroad—Crimes not Constituting Extraditable Offences.

SCHNEEBERGER *v.* PUBLIC PROSECUTOR OF THE CANTON OF LUCERNE.
Switzerland, Cour de Cassation. November 12, 1954.

THE FACTS.—The appellant, a Swiss national, had been given a suspended sentence of two months' imprisonment for fraud in June 1953, and placed on probation for three years. In February 1954, he was sentenced by a German court to ten days' imprisonment for crossing the frontier without a valid passport. In August 1954, the competent authorities of the Canton of Lucerne decided that the appellant must serve the sentence of two months' imprisonment imposed in June 1953, on the ground that he had been sentenced to imprisonment again during the period of probation. The appellant now sought to have this decision annulled. It was contended on his behalf, first, that in order to justify the termination of the suspension of the sentence, the offence committed in the period of probation had to be, in Swiss law, an indictable offence (" *Verbrechen* " or " *Vergehen* ") and not an offence of a minor nature " (*Übertretung* "), and that the offence committed in Germany was of a minor nature. It was contended, secondly, that under Article 6 of the Swiss Penal Code, Swiss nationals were subject to the jurisdiction of the Swiss courts in respect of offences committed abroad only if these offences were extraditable, and that this was not the case here.

Held: that the decision of August 1954 must be annulled. The suspension of a sentence was automatically brought to an end only by the commission of an offence considered in Swiss law to be an indictable offence (" *Verbrechen* " or " *Vergehen* "). This was not the case here.

With regard to the second contention of the appellant, the Court said: " The question may be raised whether Article 6 of the Penal Code does not make it impossible to terminate the suspension of the sentence imposed in Lucerne by reference to the new sentence. Offences against regulations applicable to aliens are not extraditable. According to Article 6 (1) of the Penal Code, the appellant is thus not subject to the Swiss Penal Code in respect of the offence committed in Germany (crossing the frontier without a valid passport). If the offence cannot be punished as such in Switzerland, it can also not be regarded as an indictable offence (" *Verbrechen* " or " *Vergehen* ") for the purpose of automatically terminating the suspension of a sentence . . . However, that question need not be decided here."

[Report: *Arrêts du Tribunal fédéral Suisse*, vol. 80 (1954), IV, p. 215.]

ii.—Over Nationals Abroad or on the High Seas and their Property Abroad

Jurisdiction—Over Nationals Abroad—Merchant Vessel in Foreign Territorial Waters—Whether Exterritorial—Acts Internal to Vessel—What is *lex loci delicti*—Relevance of Law of Port of Registry—Merchant Shipping Act, 1894.

MacKinnon *v.* The Iberia Shipping Company Limited.

Scotland, Court of Session. October 26, 1954.

(Lords Carmont, Russell and Sorn.)

The Facts.—This was an action for damages for personal injuries. The pursuer, Alexander MacKinnon, was an engineer on the S.S. *Baron Ramsay*, a vessel belonging to the defenders. In 1951, whilst the vessel was lying at anchor in an open roadstead off San Pedro de Macoris in the Dominican Republic, the pursuer met with an accident to his hand, caused, it was alleged, by an ill-fitting spanner and the negligent handling of a heavy hammer by a fellow servant of the company. Two fingers of the right hand had to be amputated and for this the pursuer claimed £5,000 damages.

The only question at this stage of the proceedings was whether the defenders' liability fell to be measured by the law of Scotland, where the vessel was registered, or whether the pursuer, in order to sue in Scottish courts, must also shew that he could sue for his damages under the law of San Domingo, which was the law applicable to the place where the accident took place; for it was conceded that the vessel was then at anchor in territorial waters of the Republic of San Domingo. It was admitted by the defenders that under both systems of law the pursuer could have an action for patrimonial loss; but they said the law of San Domingo did not recognize a claim for solatium, which the pursuer also claimed. On the other hand, the pursuer said that the only law applicable to the claim was the law of Scotland, *i.e.*, the law of the port of registration. The pursuer also relied upon s. 265 of the Merchant Shipping Act, 1894:

> " Where in any matter relating to a ship or to a person belonging to a ship there appears to be a conflict of laws, then, if there is in this Part of this Act any provision on the subject which is hereby expressly made to extend to that ship, the case shall be governed by the law of the port at which the ship is registered."

After a Procedure Roll discussion the Lord Ordinary (Migdale) allowed the defenders' plea. He held that for an action in delict to be successful there must be actionability under the *lex loci delicti* as well as under the *lex fori*. The rule was not different where the *locus* was a British ship in foreign territorial waters, for then the law applicable was the law of the territorial state.

The pursuer reclaimed (appealed).

Held: that although the events in question were entirely internal to the ship, the ship's presence in foreign territorial waters involved that the *locus delicti* was the foreign country; that s. 265 of the Merchant Shipping Act was inapplicable to a claim for damages at common law, so the pursuer's claim for *solatium* could only succeed if the claim was admitted by the law of San Domingo as well as by the law of Scotland.

Lord Carmont, after stating the facts, said: " The pursuer has reclaimed, and we heard an interesting argument in support of both branches of the case. Mr. Kissen contended that, as the vessel was only at anchor within the Dominican waters, the *locus* of the *quasi*-delict was ' the ship ' and that the law of its flag—Scots law—applied. Accordingly, as the law of the flag and the law of this *forum* coincided, no heed need be paid to Dominican law, and the pursuer was therefore justified in making no mention of it in his pleadings. The argument was presented in two aspects: (1) that a ship within territorial waters of a foreign country did not lose the benefit of the law of its flag merely by being anchored off the coast of the littoral country; and (2) that, in any event, so long as the events complained of in an action were entirely internal to the vessel, as in the present case, there was nothing to support the view that the *locus* of the occurrence was the littoral territory, whatever its extent or extension.

" There is much to be said for both branches of the pursuer's argument as to *locus* from a practical and common-sense point of view. If the occurrence giving rise to the present case had happened when the vessel was four miles off the San Domingo coast, the law of the flag would have applied, and it would not have been of any moment whether the vessel was at anchor or not. It may seem strange that a vessel proceeding along the coast of a continent, but allowing her course to bring her within three miles of the coast, should find the same occurrences as are averred in this case treated as having taken place within the territory of the littoral State which the vessel was passing at the time. That was the contention of the defenders, and they put no emphasis on the fact of anchoring. It was enough, they said, that the vessel could be shown to be—albeit by calculatons made *ex post facto*—in the waters accorded by international law to the littoral State as part of the State's territory and subject to its law. The difficulty of telling in certain cases where the vessel is, at the time an event takes place, was not blinked by the defenders; and it is, indeed, obvious that there is a certain aspect of absurdity present when the instance is taken of a ship coasting along, close to several countries in succession, while an internal repair operation is going on. The owners would find themselves liable to investigate that internal episode, resulting in an employee's injury, from the standpoint of the law of several countries that were being passed in succession. An episode in an airplane suggests even greater absurdities. I am unable, however, to find any real support for the pursuer's contention that mere passing along within territorial waters does not displace the law of the flag, or that something more intimate, if I may so phrase it, than anchoring is necessary to vouch presence within a State. But even a ship moored to a quay in a foreign harbour has little real connection with the law of the harbour's State, until something brings the ship or its master, crew or passengers into some relation to that State.

"This brings me to the pursuer's supporting argument, that, even conceding the relevance of the law of the littoral State where there is some act done by those in charge of the vessel which affects the Government of the littoral State or its subjects, or indeed any person external to the vessel, yet, when everything takes place within the ship itself, there is no ground for invoking the law of the littoral State so as to displace the law of the flag. I find this argument attractive, but to give effect to it would be breaking new ground and running counter to everything to be found in the treatises on international law, with one exception which I shall discuss in a moment, and, as regards the decisions which bear on the principle of international law with which we are concerned, we were referred to only a single case (and that the decision of a Judge of first instance) which seems to impinge on what is otherwise treated as settled.

"It is plain from what was said by Lord Atkin, when delivering the opinion of the Privy Council in the case of *Chung Chi Cheung* [v. *The King*], [1939] A.C. 160,[1] that in modern times the idea of even a Government ship being a 'floating island,' belonging to and retaining the law of the country of its flag, has been abandoned. Much less, then, can it be urged with success that a private trading vessel can claim extraterritoriality. As in *Chung Chi Cheung's* case the delict took place while the vessel was being navigated and not even at anchor, it is plain that it is the mere presence of a ship within territorial waters that is conclusive. This is in harmony with what is stated by Dicey and Cheshire in the learned treatises associated with their names. But the pronouncements of these learned authors in their texts are supported by reference to authority. I refer to the cases of *The Halley*, L.R., 2 P.C. 193; *Carr* v. *Fracis Times & Co.* [1902] A.C. 176; *The Arum*, [1921] P. 12; *Yorke* v. *British and Continental Steamship Co.* 78 Ll.L.R. 181. These cases point conclusively to the *locus delicti* being the country having the territorial waters within which the ship was at the relevant time, and that it matters not a whit whether the vessel was navigating or at anchor, in a roadstead or tied up to a quay, and also, what is equally clear, whether the events founded on as the basis of the delict or *quasi*-delict are wholly internal to the vessel, or partly external to it as in the case of a collision between vessels in territorial waters. Against this view, Mr. Kissen for the pursuer relied on the case of *The Reresby* v. *The Cobetas*, 1923 S.L.T. 719, in which Lord Blackburn, sitting in the Outer House, found some reason for not following *The Halley*, which was cited to him, which is not easy to justify, or even appreciate. In my opinion, *The Reresby* was wrongly decided.

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[1] See *Annual Digest*, 1938–1940, Case No. 87.]

" The Lord Ordinary has quoted the passage from the treatise of Dr. Colombos on which reliance was placed, but it is in conflict with the views of Dicey and of Cheshire as set forth by the Lord Ordinary. I agree with the Lord Ordinary that Dr. Colombos's view falls to be rejected as not being the law that we must apply in this *forum*.

" I turn to the argument based on section 265 of the Merchant Shipping Act, 1894, 57 & 58 Vict. cap. 60. Counsel for the pursuer maintained that the section had a much wider outlook than Part II of the Act, and that the Lord Ordinary was wrong in so restricting it. He maintained that the effect of the section was to make Scottish law, as the law of 'the port of the registry of the vessel,' the sole law applicable to events which take place within the vessel, viewed as a 'box' and affecting solely her personnel.

" He read the section as enacting that in any matter whatsoever relating to any person belonging to a ship—any ship—where there appears to be a conflict of laws (unless there is a provision in the Second Part of the Act dealing with the subject-matter of dispute and expressly extending the provisions of the Act to cover the ship to which the person belongs) the case shall be governed by 'the law of the port at which the ship is registered.' Counsel applied the section thus:—The pursuer is a person belonging to a ship, and on his bringing this action against his employers, the owners of a vessel, in the Scottish Court on a matter relating to him as a person belonging to a ship, as there appears to be a conflict as to the extent of his right to reparation between the *lex fori* and the *lex loci delicti*, and as there is no provision in the Second Part of the Act which has been made so as expressly to extend the provision on the subject to his ship, then his ' case ' (*i.e.*, action) falls to be dealt with by the law of Scotland, since his ship is registered at the port of Glasgow.

" In my opinion, there has been much confusion in the interpretation of section 265, and I do not think it was intended by the Legislature to cover matters arising beyond the scope of the precise language used, which mentions ' the law of the port at which the ship is registered ' as opposed to the law ruling at another port. Ports of registry do not have systems of law: countries have, and I think the author of Maclachlan on Merchant Shipping (7th ed., p. 203) is right in treating the section as bearing on the ' Conflict of *British* Laws '. The port of registry, Glasgow, Belfast, Liverpool, is appropriately chosen as the one most suitable for the decision of such matters as arise in Part II of the Act, in which section 265 appears. To seek to apply this section to foreign ships, on the footing of vessels having ports at which they are registered, seems quite unwarranted. Foreign ships are normally in all discussions treated as having a national status and character without regard to local or port registry, which, as a system, may in many countries never have been adopted. Foreign ships are undoubtedly distinguished as public and private vessels, but it would be highly abnormal to enter into questions of registration and the law of ports of registration unless in the case of composite countries where, as in the United Kingdom, the system of law may be different as between one port of registry and another.

" In so stating the matter, I am conscious that I am in disagreement with what is said *obiter* by one of the Judges in *The Queen* v. *Stewart*, [1899] 1 Q.B. 964, (Channell, J., at p. 970), but I do not think that that learned Judge had before him the importance of the words ' port at which the ship is registered,' or Maclachlan's treatment of the conflict being one between ' British laws.' Nor does the learned Judge seem to have noticed that in *The Milford* (1858) Swabey, 362 Dr. Lushington was working out equities in an action *in rem*.

" I am not to be taken as suggesting that all references to ships and persons belonging to ships which occur in Part II must be confined to British ships, for many decisions show that to be the wrong view. In regard to many matters dealt with in sections which appear in Part II there is a dominant general outlook, covering, in certain sections, foreign ships and foreign seamen. Even where there is express application to British ships, as, for example, in sections 260–262, the sections may cover foreign vessels, because the language used contains ' affirmative words merely and not negative words which can alone restrict some general application appearing elsewhere in the Act' (or its forerunner)—Dr. Lushington in *The Milford*. For example, in *Hart* v. *Alexander*, (1898) 2 Adam, 628, 1 F. (J.) 27, it was held that section III in Part II authorised the punishment of those who in Scotland engaged in the crimping of seamen for foreign vessels, for it would be idle to protect seafaring men so far as British ships were concerned and leave them open to being crimped for foreign vessels. This was followed with approval in *The Queen* v. *Stewart*. But on the other hand it was held in *Poll* v. *Dambe* [1901] 2 K.B. 579, by a strong Divisional Court, that section 236, also in Part II, only provided for the punishment of persons who persuade a seaman to desert from '*his* ship' if it is a British ship, and not from a foreign vessel which is lying in an English port. Each section must be carefully examined.

"There are some pitfalls when considering the scope of international law in relation to ships and seamen, the chief one of which is that, when actions *in rem* are brought in the Admiralty Courts, for them the *lex fori* alone is applied, and no regard is paid to the *lex delicti* or the *lex contractus*. Since the days of Dr. Lushington at least, when dividing up a fund resulting from the sale of a vessel, benefits analogous to the statutory liens possessed by British shipmasters are conceded to foreigners in certain circumstances. See *The Milford* and Phillimore J.'s discussion of it in *Poll* v. *Dambe*, [1901] 2 K.B. 579, and in *The Tagus*, [1903] P. 44.

"There is another pitfall, because the English Admiralty Court sometimes exercises a 'discretionary jurisdiction' over foreign vessels and seamen, and, I assume, applies the *lex fori*, but this assertion of right is so unsubstantial that it is liable to be departed from on receipt of a protest from a Consul of the State to which a vessel belongs. See *The Tagus*, as affected by the earlier cases of *The Nina* (1867) L.R., 2 A. & E. 44, and *The Leon XIII*, (1883) 8 P.D. 121. Even although the state of the authorities precludes me from saying, as a general proposition, that Part II of the Merchant Shipping Act only deals with the rights of British ships and British seamen (unless of course others are specifically mentioned), it is proper so to interpret section 265 on its merits, if I may so phrase it. Whatever be the scope of section 265 as regards 'ships' and 'persons belonging to ships', there is nothing to suggest that the subject-matter of the dispute falling under section 265 can be claims which fall outside Part II of the Act, within which the section is placed. Indeed, when the section contemplates the possibility of express provision covering the matter being found in the Act, such a provision is to be found in Part II and only there. Part II deals with masters and seamen, their qualification, supply, engagement, accommodation, health, discipline, crimping, desertion, wages and so forth. To include claims for damages at common law among the matters covered by section 265, by the wide interpretation the pursuer seeks to put on the language used, seems to me to open the door too wide. To sustain the reading put forward would enable the English stewardess of a Jersey-registered liner to bring an affiliation action in Glasgow against a Scottish seaman who happened to be on board, and on allegations of conflict of law, and that Part II did not expressly contain a provision on the subject-matter of the claim, insist on having the case dealt with by the law of the port at which the ship was registered—St. Helier. I think the Lord Ordinary's conclusion as regards section 265 is right, and that the pursuer's argument on it should be rejected.

" It remains to consider the future course of the case. The Lord Ordinary, being against the pursuer's contention that the law of the flag should govern the case, and also against his contention as to the law of the ' port of registry,' has nevertheless allowed a proof. This was in respect of the defenders' admission, which is implicit in their answer, that the pursuer has a case for reparation at common law to the extent allowed for patrimonial loss. The Lord Ordinary allowed a proof on that matter, putting the allowance in terms of an exclusion of solatium from probation. This is based on the defenders' statement. As the pursuer in terms denies the defenders' averments as regards solatium, the interlocutor cannot stand. The pursuer makes no positive averment as to what the law of San Domingo is, and I do not see how that matter can be enquired into as the pleadings stand. If the defenders had been prepared to assume the burden of showing that solatium is not part of the Dominican law, the proof might proceed, but the defenders are not, and, if the pursuer wishes to show what the Dominican law is, he should put averments on record of what he wants to prove. The case will be continued to enable the pursuer to consider his position in the light of our opinions."

Lord Russell, concurring, agreed with the reasons given by Lord Carmont.

Lord Sorn, after stating the facts, said: " As regards the first point, I think that, for the purpose of the rule no distinction is to be drawn between territory and territorial waters. In *The Halley* L.R., 2 P.C. 193, a collision took place in Belgian waters when the defendants' ship was in the hands of a compulsory pilot. Under Belgian law the defendants were liable for the negligence of the pilot, whereas under English law (at that date) they were not. In the judgment delivered by the Privy Council there is no trace of the view that Belgian law did not apply because the delict took place in Belgian waters as opposed to Belgian territory, and the ground of judgment was that the defendants must succeed because the plaintiff would have had no right of action if the delict had occurred in England. In *Carr* v. *Fracis Times & Co.* [1902] A.C. 176, the alleged delict was committed in foreign territorial waters and no distinction was made between the law applicable to that situation and the law applicable to a delict committed within foreign land territory. On the contrary, in speaking of the act complained of, Lord Macnaghten says (at p. 182): 'It was committed in the territorial waters of Muscat, which are, in my opinion, for this purpose, as much a part of the Sultan's dominions as the land over which he exercises absolute and unquestioned sway'. In *The Arum* [1921] P. 12, a collision took place owing to the fault of a compulsory pilot in the territorial waters of Gibraltar, where compulsory pilotage was a good defence. In England, at that date, it was not a good defence. Hill, J., had no difficulty in holding that the plaintiff failed because his case was not actionable under the *lex loci delicti.* It is true that in the Scottish case of *The Reresby* v. *The Cobetas*, 1923 S.L.T. 719 a different result was arrived at. In that case a collision occurred between a British and a Spanish vessel in French territorial waters. Lord Blackburn held that it did not matter whether the pursuer had an actionable case by the law of France and that the rights of parties were governed solely by the *lex fori.* He drew a distinction between acts occurring upon the land territory of a foreign State and acts affecting ships in passage through territorial waters, but the ground of distinction is not clear and I do not think that the decision can stand with the other cases to which I have referred.

"Mr. Kissen's next point was that, although the rule might apply to *external* acts occurring in territorial waters, a different rule should be applied to acts which took place entirely on board ship. External acts, he said, no doubt had a local habitation but internal acts need not be treated as having a *locus* other than the ship itself. For such an act the proper law to look to was the law of the ship itself, that is to say, the law of the flag. The test in such a case should be actionability by the law of the flag and actionability by the *lex fori.* As I understood the argument, it was not suggested that extraterritoriality in the matter of jurisdiction should be conferred on the ship with regard to such acts, but only that the law of the waters should be displaced by the law of the flag in the matter of choice of law. The injured party would be free to seek his remedy in any Court under the municipal law of which he could found jurisdiction, including the Court of the littoral State, but, it was argued, in so far as the system of law observed by that Court referred the ascertainment of a pursuer's rights to the *lex loci delicti*, the law of the flag in these cases should be substituted for the *lex loci delicti.* The law of the flag, and the subjection of those on board to it, already had a place in our practice of international law, and, it was said, there could be nothing incongruous in applying that law here. On the other hand, to apply the law of the geographical *locus delicti* produced results which had an element of absurdity. Did it contribute anything to the comity of nations that a Glasgow man, injured in the engine room of a Glasgow ship whilst on a voyage, should have his rights determined by the law of San Domingo in an action raised in this country when he got home? In the present case the ship was anchored in territorial waters, but, if the *lex loci* is to be applied here, it is to be assumed that it would also have to be applied even where the ship was only in course of passage through such waters. To the objection that the introduction of a distinction between external and internal acts would involve an additional, and perhaps troublesome, question in determining the choice of law, Mr. Kissen was able to point out that the distinction already had received some recognition in connexion with *quasi*-delict committed on the high seas—Dicey, (6th ed.) p. 805; Cheshire (4th ed.) p. 272. The force of Mr. Kissen's argument has impressed me, and *re integra* there would be much to be said for adopting the rule he suggests. I have, however, not found it possible to treat the matter as being an open question. The rule that the *lex loci delicti* applies to territorial waters appears to me to have stood for a long time without any distinction being drawn between one kind of act and another. Our leading textbooks state the rule in terms applicable to both external and internal acts. We were not referred to any case in which the distinction had been considered or even suggested. The inference to be drawn, is, I think, that it has been tacitly accepted that the rule applies to all acts, including those which take place wholly on board ship. Certain observations of du Parcq, L.J., as he then was, in *Yorke* v. *British and Continental Steamship Co.* 78 Ll.L. 181, seem to show that he at any rate went upon that assumption. In that case the plaintiff, one of the ship's officers, had met with an accident on board while the ship was at Gibraltar. He brought an action in England for damages against the owners, alleging, *inter alia*, that the accident was due to their common law negligence. There was no allegation in the pleadings that the act complained of was a wrongful act by the law of Gibraltar, and it would seem that this question had never been raised in the course of the proceedings. In agreeing with the view that the plaintiff had succeeded in establishing a case of negligence du Parcq, L.J., said (at p. 184):

> 'But I just want to add this. I think that in a case of this kind it is desirable, and indeed it may be essential, strictly speaking, that the statement of claim should allege that the act complained of—negligence in this case—is a wrongful act by the law of the country where the tort is alleged to have been committed. It is perhaps rather pedantic to say anything more about it in this case, but, as anybody reading a report of this case will see it is matter arising from what is foreign territory for the purposes of this case, it is perhaps as well to make it clear that on that point the matter was dealt with.'

Since the point was not presented for decision, the case need not be regarded as a precedent to the effect that no distinction is to be drawn between internal acts and other acts. None the less I think the passage quoted, to which must be attached the weight associated with the opinion of an eminent Judge, confirms the view that it has been tacitly accepted that no such distinction is to be drawn.

" Finally, there was the argument that the choice of law in the present case was governed by section 265 of the Merchant Shipping Act, 1894. In my opinion, that section relates only to the applicability of the contents of Part II of the act and has nothing to do with the choice of law in a case like the present. It only comes into play when there is, or appears to be, a question whether, with regard to some matter dealt with in that Part of the Act, the situation is to be governed by a provision contained in that Part of the Act or by some other law. That being so, I find it unnecessary to enter further into the meaning of the section.

" In reaching the above conclusion it has been assumed that a claim for solatium is a separate right of action and that its relevance, therefore, must depend upon the actionability of such a claim under the foreign law. It was in fact so decided in *Naftalin* v. *L.M.S. Railway Co.* 1933 S.C. 259, and *M'Elroy* v. *M'Allister*, 1949 S.C. 110, but in both of these cases the claim for solatium was put forward in that peculiar action by which our law allows a person to sue for compensation in respect of the death of a near relative, whereas in the present case the claim is comprised in an ordinary action of damages. I am not saying that this difference affords a good ground of distinction, and merely mention the point in order to say that we were not asked to consider it, the pursuer not having disputed the applicability of these two decisions to the present case.

" As regards the disposal of the case, I agree that the pursuer should be given an opportunity of considering whether he desires to go to proof on Dominican law and, if he does, of amending his record."

[Report: 1955 S.C. 20.]

B—EXTRATERRITORIAL JURISDICTION: CONSULAR JURISDICTION. RÉGIME OF CAPITULATIONS

Jurisdiction—Régime of Capitulations—Capitulatory System in Morocco—Acquisition of Capitulatory Rights by Custom—Termination of—Requirement of Express Renunciation—Power of the International Tribunal of Tangier to Interpret Treaties—Binding Force of Judgments of the International Court of Justice.

MACKAY RADIO AND TELEGRAPH COMPANY (appellants) *v.* LAL-LA FATMA BENT SI MOHAMED EL KHADAR AND OTHERS (respondents).

Tangier, Court of Appeal of the International Tribunal.

(Diaz Merry, President; Apostoli and Wauters JJ.)

August 13, 1954.

THE FACTS.—This was an appeal by the Director of the Mackay Radio and Telegraph Company against a judgment of the Court of First Instance of the " International Jurisdiction " (hereinafter referred to as the " International Tribunal ") of Tangier. In that judgment, the Tribunal assumed jurisdiction in an action concerning the registration of real property. The appellants, relying on the capitulatory rights of the United States of America, denied that the Tribunal had jurisdiction. In particular, they denied that the Judgment of the International Court of Justice in the *Case concerning Rights of Nationals of the United States of America in Morocco*[1]—a judgment on which the International Tribunal relied—was binding upon the latter. They also maintained that the Tribunal was not competent to interpret international treaties.

Held: that the decision of the Court below must be reversed.

The Court said: " Even if the International Tribunal of Tangier did not claim to be an organ for the interpretation of treaties, it is evident that it not only can, but, contrary to the thesis propounded by counsel for the defence, must base its decisions precisely on such treaties. In effect, when Article 11 of the Paris Convention of 1923 declares that in case of any divergence between treaties and the laws of the Legislative Assembly, the treaties[2] shall prevail, it establishes at the same time a true hierarchy of laws (see *Ministère Public* v. *Aerts and Azerraf*,[3] decided on March 9, 1939, by the Court of Appeal). The appropriate body to appreciate such a divergence between the texts is in fact the International Tribunal. Obviously, such appreciation can only be based on the interpretation and application of the treaties. The Court has always understood it in this manner and has proceeded to the interpretation of treaties in highly important decisions, such as the one cited above and, more recently, in its judgment of March 18, 1949, in *In re Toledano.*

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[1] See *International Law Reports*, 1952, Case No. 51.

[2] " Treaties to which all the Powers Signatories of the Act of Algeciras are Contracting Parties."

[[3] See *Annual Digest*, 1938–1940, Case No. 23 (*sub nom. Public Prosecutor* v. *Aerts*).]

"If the judgment in the present case is to be founded on a declaration of competence or incompetence of the International Tribunal in the presence of a capitulatory jurisdiction which finds its origin in the treaties, then it is unquestionable that only the examination of these treaties and the accompanying interpretation thereof will reveal sufficient and adequate elements to enable the solution of the matter in hand.

"The declaration of competence as set forth in its findings by the Court of First Instance is based on the decision of August 27, 1952 of the International Court of Justice at The Hague, as well as on the interpretation of various provisions of treaties and municipal law which favour the competence of the Tribunal, such as Article 13 of the Convention of Paris [of 1923] and Article 1 of the Annex to the Dahir on Judicial Organization, and on the Paris Agreement of 1945.

"The Court of First Instance considered that the Judgment of the Hague Court was applicable to Tangier, in spite of its express declaration of exclusive and limited applicability to the French Zone of Morocco and of the evident validity of the four Dissenting Opinions. However, the Judgment of the International Court of Justice of 1952 is not applicable to the Tangier Zone because, first, it does not create precedent, the Judgment itself declaring that its applicability is limited to the French Zone of Morocco; secondly, because, even if this were not so, such decision might at best provide inspiration and guidance, although not because its judgments have any binding force in municipal courts; and, thirdly, because the judgments of the International Court of Justice resolve differences arising between States, which differences usually refer to conflicting interpretation of treaties between the two nations concerned. The juridical value of such judgments is centred on the differences with which they deal, and the judgments are binding only upon the High Contracting Parties, who must then take the necessary internal legislative measures to carry out the decisions of that high Court. For these reasons, those judgments cannot have an obligatory character on individuals who might litigate on similar matters.

"Once the above has been established, but before going into the general problem of competence—which is necessarily related to the survival of the American capitulatory system—we must examine the arguments which, independently of the general question of registration of real property, form the basis of the claim of competence submitted by the respondents. These arguments find support in Article 1 of the Dahir on Judicial Organization, in Article 13 of the Convention of Paris of 1923, and in the 1945 Paris Agreement. None of these references by themselves, however, justify a declaration of competence on the part of the International Tribunal, nor can they be construed within the overriding question of competence above-mentioned so as to provide an affirmative answer to the question of the competence of the International Tribunal by reason of the cessation of the consular jurisdiction. Article 1 of the Annex defines a general form of competence in relation to the native jurisdictions. It establishes that the Mixed Court is competent to determine all matters, civil or commercial, involving subjects of foreign Powers. But Article 13 of the Convention (Article 1 being complementary to it) clearly states that as a consequence of the establishment of a Mixed Court, the capitulatory régime in the Zone is abolished and that this abolition carries with it the abrogation of the régime of protection.

" As Capitulations are a privilege accorded or consented to by foreign Powers, it cannot be doubted that a treaty to which a given foreign Power has not adhered can never imply the loss of a privilege. In the present case, the provisions of Articles 1 of the Annex and 13 of the Dahir, which are part of an agreement contracted exclusively between Spain, France and Great Britain, can bind only those three States. Moreover, for internal purposes they define the competence of the International Tribunal only in relation to the native jurisdictions. It is not necessary to elaborate this point. However, it must be pointed out that the Italian consular jurisdiction continued to function after the signature of the agreements above-mentioned until the Final Protocol of 1928 was signed. When Article 13 of the Paris Convention [of 1923] speaks of the abolition of Capitulations in the Zone of Tangier, it refers only to the consular jurisdictions of those States which were signatories to the Convention. The Court of First Instance was right in holding, in its judgment of November 8, 1949, that the creation of this Tribunal had counterbalanced the abrogation of the Capitulations assented to by all the beneficiary nations, with the exception of the United States of America, and that the only foreigners who may summon before it a Moroccan national are those individuals whose Governments have renounced their capitulatory rights. Similarly, and by a parity of reasoning, that judgment may be said to be incorporated in the internal law of the International Zone. Thus, when Article 43 of the Paris Convention [of 1945] provides that the Mixed Tribunal is entrusted with the administration of justice to the subjects of the foreign Powers, it refers to those foreigners to whom the rule *actor sequitur forum rei* does not apply, namely, to those States which have abandoned Capitulations and whose consular courts were replaced by the Mixed Tribunal.

" As to the 1945 Agreement, and with special reference to the Final Act of the Conference, the Court of Appeal need only reproduce the basic argument of the said Judgment, which is that ' The Final Act of the Paris Conference of August 1945 has not modified in any way the position of the United States of America in relation to the judicial institutions of Tangier.' The participation of the United States in certain organs of the International Administration in no way modifies its position. At best, it implies an act of good will and of possible preparation by paving the way for a realistic attitude in the future concerning this jurisdictional problem. It does not presuppose a renunciation of privileges previously acquired, the disappearance of which may only come about through an express declaration.

" While the renunciation of a privilege cannot be determined in accordance with municipal law, there still remains to be settled to what extent, and in what measure, United States nationals in Morocco may invoke the privilege, and whether it exists and is still maintained in accordance with custom and with the law as expressed in the Conventions. From this point of view, there is cogent evidence to support the proposition that Capitulations do not exist within the terms of the Treaty of 1836 between Morocco and the United States of America, and in particular within the extended provisions of Articles 20 and 21 of that Treaty.

" However, that Treaty cannot be disregarded, despite what may be the purport of the Judgment of the International Court of Justice . . . It therefore becomes imperative to decide whether the capitulatory rights and privileges acquired by the United States of America through the Treaties of 1787 and 1836 in regard to civil and commercial, as well as criminal, matters, between United States citizens have been extended by customs, usage or treaty to actions wherein the defendant might be a United States citizen. Such extension took place by virtue of the most-favoured-nation clause, already included in the bilateral Treaties of 1787 and 1836 and reproduced in the Treaty of 1856 between Great Britain and Morocco, as well as in the Treaty of 1861 between Spain and Morocco, which granted the widest benefits in jurisdictional matters to these two States and, in consequence, to the United States of America as well. In these circumstances, if these privileges of the most-favoured-nation ceased to exist—as in the case of Great Britain in 1937 and in the case of Spain in 1912 and 1914—then the question arises whether the rights of other States have been automatically extinguished as a result.

" There are strong reasons urging the survival of benefits acquired by way of extension of the privileges of the most-favoured-nation clause by custom as indicated above. First, because the extension of a privilege is an independent form of acquisition which is not subject to extinction by reason of the disappearance of the first beneficiary. There is no authority which suggests or provides for such extinction. In the second place, there can be no question of the discontinuance of a privilege such as this, but only of its voluntary renunciation with counter-benefits provided in exchange . . . Although Great Britain in 1937 renounced its capitulatory rights in the French Zone of Morocco, it has not waived its privileges in the Spanish Zone. Therefore, even if the foregoing reasons are not sufficient, the United States also may maintain the privilege exercised at the present time by Great Britain in one part of the country by virtue of the Treaty of 1937.

" Apart from the validity of the above considerations, after its abandonment by Great Britain in 1937 the régime of Capitulations maintained by the United States of America in Morocco was at that time still considered to be in force. This is stressed in the four Dissenting Opinions to the Judgment of the International Court of Justice wherein reference is made to a Note from the French Ambassador at Washington, dated August 26, 1937, which says that ' The United States continue to enjoy the benefit of the capitulatory régime in Morocco '. Therefore, after the British renunciation of 1937, it was clear in the minds of all that the capitulatory régime in favour of the United States still survived and that this would be so as long as that State had not freely consented to its abolition . . . .

" The negotiations carried on by France between the years 1914 and 1916 with various States, as a result of which the latter gave up their capitulatory privileges, proved two things. The first was that usage was indeed considered a source of jurisdictional rights, since some of those States maintained no treaty relations with Morocco. The second was that in order to extinguish a privilege it was necessary to prove an express renunciation of the rights and privileges deriving from the capitulatory régime even if such privileges were not created by a treaty. It is certain that the United States of America have not expressly renounced their capitulatory rights. Therefore the jurisdictional privilege, the reality of which appears unquestionable, must be considered as existing with regard to the Tangier Zone. In the face of this continuing privilege the International Tribunal must declare itself incompetent. . . .

" In summing up, it may be said that the privilege has not been given up. A régime which is based upon a recognized custom or usage can only be abolished through the normal means of abrogation of international arrangements. This is so in particular with regard to consular jurisdictions where treaty law has included within its sphere all the undeniable pre-existing custom which existed for more than a century before the British renunciation. Article 14 of the Treaty of 1856 and Article 16 of the Treaty of 1861 amply prove this. They both refer to the capitulatory jurisdiction as being ' in accordance with the established custom hitherto observed ', that is, custom which before and after the signing of the Treaties produced certain recognized effects. It follows that usage as a source of jurisdictional privilege cannot be set aside once it has been fully established by express declaration in the Treaties. . . ."

[Report: Unpublished.]

PART V

STATE RESPONSIBILITY

A—NATURE AND KINDS OF STATE RESPONSIBILITY

VI.—For Wrongs Unconnected with Contractual Obligations

i.—Acts and Omissions of State Organs and Officials

(d) Plea of Non-Discrimination against Foreigners.

[*See also* Part IV, Jurisdiction: A, I, Territorial, i, Expropriation of Alien Property.]

State Responsibility—For Acts and Omissions of State Organs and Officials—Negligence or Default of Administrator—Sequestrator of Enemy Property—Carrying On Business in Manner Contrary to Rules of Good Management—Discriminatory Measures of Home Government—Discriminatory Measures of Occupant—Whether Resulting Loss is " Loss of Profit "—Compensation under Peace Treaty with Italy, 1947.

Schappe Spinning Mill Claim.

Franco-Italian Conciliation Commission. July 6, 1954.

(Bolla, de Feral, Sorrentino.)

The Facts.—The claimants were a French limited company, carrying on a silk manufacturing business at Lyons. The Company had a branch establishment—a factory—at Rozzano, near Milan, and a sales office and a shop in Milan itself. The factory at Rozzano was severly hit by the world economic crisis of 1929–1930, and from 1932 to 1938 showed little activity. War having on June 19, 1940, been declared by Italy on France, the Prefect of Milan by a series of decrees placed under sequestration, as enemy property, the assets of the Schappe Company and all its immovable property in Italy. In October 1940, a decree of the Italian Ministry of Corporations ordered the sequestration of the Company itself and an administrator-sequestrator was appointed, with authority to continue working the business. (The earlier decrees were revoked in March 1941.)

After the Allied Forces entered Milan in 1944, the business remained under provisional administration until the resumption of normal relations between France and Italy permitted the directors of the company to resume the management of their factory, in May 1946.

On February 15, 1950, the French Government referred to the Conciliation Commission the Company's claim under Article 78 (4) (*a*) and (*d*) of the Treaty of Peace[1] for compensation for, *inter alia*, loss resulting from measures taken against the Company, and in particular from the administrator-sequestrator having sold the Company's stock on the Italian home market in the most unfavourable conditions, he not being able to continue operating in the Company's usual fashion, by reason of the absolute opposition of the Ministry of Corporations. Several requisitions had been made on the business, and although payment had been received it was not sufficient to replace the requisitioned goods.

Held: that the claim must succeed. The claimant's property had been subjected to discriminatory measures involving the responsibility of the Italian State.

The Commission said: "The Franco-Italian Conciliation Commission has several times laid down the principle that the responsibility of the Italian Government under Article 78 (4) (*d*) of the Treaty of Peace is not engaged merely by its having ordered the sequestration as enemy property of the property mentioned in Article 78 (1) of the Treaty of Peace. The sequestration of enemy property in time of war is a conservatory measure, taken equally for the protection of the owner. The Italian Government is responsible for the acts of the administrator-sequestrator if they are marked by error or by fraud. In the present case, the sequestration decree of October 12, 1940, authorized the administrator-sequestrator to carry on the business. But it did not impose on him a duty to do so. One report of the administrator-sequestrator, made in 1941, stated that the factory at Rozzano had been 'almost inactive for some time' (in fact since 1938). The administrator-sequestrator cannot be blamed for not wishing to see the plant standing idle, if that could be avoided, if only in the interest of the workpeople. But he recognized implicitly, in a request dated in April 1941, that two conditions were desirable before any activity could be recommenced —(a) [an assured supply of stock] and (b) [a decision whether the silk thread produced should be destined either for weaving for the home market or for export]. In fact, only on the export market would good prices be obtained. The Government-controlled prices on the home market were too low, while the black market in Italy brought better prices for manufacture. Neither of the two conditions envisaged by the administrator-sequestrator were realized. [The Commission cited official reports on the difficulties of obtaining supplies of silk and also a letter from the administrator-sequestrator to the Minister of Corporations from which it appeared that the latter had forbidden the former to apply for export licences for the products of the Rozzano factory.] As a result, the decision of the administrator-sequestrator that the Rozzano factory should make up the stocks existing at the time of the sequestration and to sell the produce on the home market, at the official price, led to the using up of part of the stock-in-trade at Rozzano. Such conduct on the part of the administrator-sequestrator amounts to negligence, for which the Italian Government is liable under Article 78 (4) (*d*) of the Treaty of Peace. . . . The first duty of an administrator-sequestrator is to conserve the capital assets of the business which is entrusted to him. If it has a large stock of raw material, the administrator-sequestrator ought not to have it made up into semi-finished products so long as it is not possible for him to replenish the stock nor to sell the products on the only market where a profit is assured. That is particularly the case in a period when the devaluation of currency is not only a more or less remote danger, but an increasing and fatal reality. It is common knowledge that most of the industries of Northern Italy took good account of that reality during the war of 1939–1945, and managed to conserve at least part of their stocks.

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[1] Article 78 (4) (*a*) provides :

"The Italian Government shall be responsible for the restoration to complete good order of the property returned to United Nations nationals under paragraph 1 of this Article. In cases where property cannot be returned or where, as a result of the war, a United Nations national has suffered a loss by reason of injury or damage to property in Italy, he shall receive from the Italian Government compensation in lire to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered. In no event shall United Nations nationals receive less favourable treatment with respect to compensation than that accorded to Italian nationals."

Article 78 (4) (*d*) provides:

"The Italian Government shall grant United Nations nationals an indemnity in lire at the same rate as provided in sub-paragraph (*a*) above to compensate them for the loss or damage due to special measures applied to their property during the war, and which were not applicable to Italian property. This sub-paragraph does not apply to a loss of profit."

" . . . The administrator-sequestrator ought to have devoted himself solely to the interests of the sequestered Company, so long, of course, as he did not infringe Italian law, including war-time legislation; but the latter did not impose on him any duty to revive an almost defunct concern, at a time when there were no sources of supply, the normal outlet for its products was cut off, and any profitable outlet was closed by the measures of the Italian Government.

" On behalf of the Italian Government it was sought to rely on the decision of the Commission in the *Pertusola Claim*[1] of March 8, 1951. It was there held that stocks and supplies form a part of capital assets, fluctuating in the course of business and, if the latter continues to be carried on, it is not sufficient merely to compare inventories taken at the beginning and at the raising of a sequestration and fix the Italian Government with responsibility for the deficit. Those principles may now be confirmed. It is possible, for instance, that the diminution of the stocks corresponds to an increase in book debts.

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[1] *Recueil des Décisions*, Part III, p. 67 [*International Law Reports*, 1951, Case No. 129.]

In the present case, the responsibility of the Italian Government results from the administrator-sequestrator having, without any compelling necessity, converted stock into half-finished products, an operation which must show itself in a reduction of stock in hand. As a result of measures taken by the Italian authorities, both corporative and political, replenishment of stock, either in Italy or from abroad, was prevented, and export sales, which alone were profitable, were forbidden, as was the mere sending of the half-finished products for spinning at the French and Swiss factories of the Schappe Spinning Mill Company.

" It was also objected on behalf of the Italian Government that had raw material been allocated to Rozzano, it would only have been on condition that it was used for the purpose of manufacture. But such use would not have prevented the maintenance at the same level of the stock of raw materials, which, in the circumstances of the time, appeared to be an elementary duty of the administration-sequestration. Another argument on behalf of the Italian Government is that what the French Government is claiming for the Schappe Spinning Mill Company is really a loss of profit, which is excluded by the last sentence of Article 78 (4) (*d*) of the Peace Treaty. In fact, the French Government is not claiming the profit which would have been realized by the sale of ' combings ' from raw materials not seized by the Italian authorities; it relies on the considerable losses which have been caused to the Schappe Spinning Mill Company by the use of their stocks in a way that was contrary to all the rules of good management.

" The above-mentioned measures of the Italian authorities, both corporative and political, had, in the view of the Conciliation Commission, the discriminatory character envisaged by Article 78 (4) (*d*) of the Treaty of Peace.

" For a measure to be properly called ' discriminatory ' it is not at all necessary that it should consist of a legislative or regulatory enactment, making, in a general manner, distinction between the treatment—less favourable—to be accorded to enemy property and that—more favourable—to be accorded to other property or, at least, property belonging to nationals and situate in the national territory. It is sufficient that a measure be taken, within the scope of its discriminatory power, by the Italian authority, if the said measure had and was meant to have detrimental consequences for enemy property, and if no objective motive can reasonably be invoked to justify it, so that it must be concluded that the measure was occasioned by the enemy character of the property in question. What the Treaty of Peace intended to deal with was not only overt discrimination but [also] discrimination which was actual and effective even though disguised. [The Commission examined the allegation—which it showed to be ill-founded—that the claimants' business had shown but little activity before the war; and reviewed the measures taken by the Italian corporative authorities against the claimants, such as exclusion from distribution of raw materials and prohibiting the administrator-sequestrator from even applying for an export licence—these " could be explained only as measures taken against an enemy undertaking as such ".]

" The discriminatory nature of the measures taken against the sequestrated business appears clearly from [an order of the German Textile Control made in September 1943[1]] which had the effect of reserving silk waste for concerns, whether Italian or foreign, which were willing to send their products to Germany. The order made a distinction between those firms which had normally sent supplies to Germany and those which had not, and it appears that only the French undertaking at Rozzano came within the latter category . . . no business carried on in Italy and belonging to Italians came within it. It is to be noted that the German order came after the Italian corporative authority had recognized that the exclusion of Rozzano from the distribution was unjustified.

" It is clear that, in themselves, the two discriminatory measures taken by the Italian corporative authority and consisting of denying to Rozzano the possibility both of obtaining supplies of raw material in Italy or abroad and of exporting at a profit the half-finished products did not bring about for the Schappe Spinning Mill Company a loss of profit, compensation for which is excluded by Article 78 (4) (*d*) of the Treaty of Peace. As a result of those measures the Company did not make the profit which they would have obtained from manufacture for export of the raw material which ought to have been allocated to them or which they ought to have been allowed to import. But the discriminatory character of the measures above referred to emphasizes even more the default of the administrator-sequestrator: placed as he was by the discriminatory measures of the Italian Government in a position where it was impossible to carry on business at a profit, he ought at least to have safeguarded the value of the existing stocks instead of employing them in the manufacture of products which could not be sold at a profit and that when all replenishment of stocks was made impossible by the attitude of the Italian Government. The effect of such manufacture was eventually to replace real assets, the value of which increased continually and was bound inevitably to continue to increase until the end of the war, by paper money, the value of which diminished continually and was bound inevitably to diminish until the end of the war. If the Italian Government had, in these circumstances, compelled such manufacture, it would have added to the two measures already mentioned a third measure, equally discriminatory, which would have made it directly responsible for the loss resulting therefrom by way of diminution of the intrinsic value of the business."

[[1] When Northern Italy was under German occupation.—A.B.L.]

The Commission calculated in detail the amount of the compensation due to the claimant Company and " in exercise of its full power of assessment, ordered, *ex aequo et bono*, an indemnity in lire equal to two-thirds of their loss (Article 78, para. 4 (*a*) and (*d*)) of a round aggregate of twenty million lire, including the expenses of establishing the claim (Article 78 (5)) ".

" On behalf of the French Government, a further sum was claimed for the expenses of the administrator-sequestrator. Under para. 2 of Article 78, the restoration of property which had been subject to measures of sequestration or control should take place without any deduction and without the imposition of any charge. It would be inequitable, it was contended, to make the Schappe Spinning Mill Company bear the expenses in connection with measures which were taken against it by reason of its enemy nationality and moreover which were the cause of the loss which the Company had suffered. The sequestration being also a measure of conservation, the owner of the sequestrated property ought, in principle, to bear the expenses, which are not a charge within the meaning of Article 78 (2) of the Treaty of Peace. It is true that in this case the administrator-sequestrator, by his default, caused the Schappe Spinning Mill Company to suffer a loss, but that does not alter the fact that the administration for several years resulted in the exertion on behalf of the Schappe Company of efforts rendered necessary by the state of war and by Italian war legislation, and that at least some of that activity benefited the Company. Needless to say, the Conciliation Commission should reserve the right to examine the account for the expenses of the sequestration, in case any of the charges are excessive. But there has been no specific allegation on the part of the French Government of any such overcharging."

[Report: Unpublished.]

NOTE.—The Italian member of the Commission appended a note to the effect that on the facts of the case the conduct of the administrator-sequestrator was not such as to involve the responsibility of the Italian Government.

B—CLAIMS

I.—In General

State Responsibility—Claims—Nature of—Mortgages.

BRUNNER CLAIM.

United States, International Claims Commission.[1]

THE FACTS.—In 1932, the claimant, a United States citizen, took a mortgage of certain real property in Yugoslavia. In 1945, the property was confiscated by the Government of Yugoslavia under the Law relating to Enemy Property of November 21, 1944 (*Official Gazette* No. 2 of February 6, 1945). The claimant now claimed $2,800, the equivalent of the amount of the loan, which was 49,300 dinars. The Yugoslav Government contended that it had not taken any of the claimant's property within the meaning of the Agreement of July 19, 1948, between the Governments of the United States of America and Yugoslavia regarding pecuniary claims of the United States and its nationals. It did, however, admit responsibility for the encumbrance and suggested that the claimant apply direct to it for relief. The Yugoslav Government also contended that in view of the devaluation of pre-war debt obligations, the amount of the mortgage was now only 4,930 dinars.

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[1] The exact date of the decision does not appear from the Report as published in 1955. It would seem that the decisions of the Commission were given in the years 1951–1954.

For the establishment and functions of the Commission see *supra*, p. 55, n. 1.

Held: that the claim must be allowed in full. The claimant had a right and interest in property which could be enforced under the Yugoslav Claims Agreement of 1948, and in the circumstances of this case the devaluation of pre-war debts did not apply to her claim.

The Commission said: " In its determination of claims involving the taking of real property from owners thereof, the Commission has made appropriate reductions in awards in recognition of mortgages on such properties. Such reductions reflect the proper net values of the interests of the owners of the properties. We are of the opinion that the mortgagee has a right and interest ' in and with respect to property ' as that term is employed in the agreement of July 19, 1948, . . . and that such right and interest are entitled to recognition by the Commission.

" The principal amount of the mortgages . . . is 49,300 dinars. The Government of Yugoslavia admits only the amount of 4,930 dinars, obviously giving effect to the law on the settlement of pre-war obligations of October 27, 1945 (Official Gazette No. 88 of November 13, 1945), providing for a 90 percent depreciation in debt amounts in certain instances. However, the effective date of the transfer of the real property to State ownership is February 6, 1945, in accordance with Article 1 of the law on enemy property of July 31, 1946 (Official Gazette No. 63 of August 6, 1946). At the date of taking (February 6, 1945), the amount of the mortgage was 49,300 dinars. The Yugoslav provisions as to the reduction of the obligation were not effective until November 13, 1945, more than 9 months after the confiscation of the real property took place. On the basis of the time period alone, those provisions have no applicability to the present situation."

[Report: *Settlement of Claims*, 1949–1955, p. 52.]

NOTE.—In the above case the Commission followed its decision in the *Loschke Claim* (*ibid.*, p. 52) allowing a claim for a legal mortgage as an " encumbrance right " in and with respect to real property. As regards equitable mortgages, however, see the *Moser Claim* (*ibid.*, p. 51), in which the claimant had lent money to a certain Pereles " to be used for the purchase of equipment and investments into Villa Elsa, Laurana "; and " it was agreed upon that the loan should be considered as an equitable mortgage to be refunded from the proceeds and value of the said property." The Commission *held* that the claim must be rejected, saying: " The question presented is whether the claimant acquired by this transaction property or rights and interests in and with respect to property in Yugoslavia, which, if nationalized by the Yugoslav Government, can be compensated for out of the fund created by the Yugoslav Claims Agreement of 1948 [see *supra*, p. 55, n. 1].

" It is obvious from the evidence that the claimant was not the owner of a recorded mortgage on real property nationalized or otherwise taken by the Yugoslav Government. In fact, the evidence does not indicate that the claimant even acquired by the transaction what is known as an equitable mortgage. Even if the circumstances could be construed as giving rights to an equitable mortgage, such is not recognized under the law of Yugoslavia, the situs of the real property. Consequently, the claimant is not the owner of property or rights and interests in and with respect to property in Yugoslavia which was nationalized or otherwise taken by Yugoslavia between September 1, 1939 and July 19, 1948."

With regard to an alleged maritime lien, see the *Simpson Claim* (*ibid.*, p. 55), in which the Commission disallowed the claim, saying: " Claimant now suggests a new theory to support its claim in order to bring it within the terms of the Agreement above referred to. This theory is that, by the advances of monies to the master of the vessel, claimant obtained a maritime lien against the vessel and thus acquired rights and interests in and with respect to property. Claimant relies on the case of *Rodriguez* v. *British M/V G. K. Dauntless*, 70 F. Supp. 958. An examination of that case leads us to the conclusion that it is not applicable to the facts presented here. The doctrine of that case is that a special agent, acting in a particular port for a particular voyage, acquires a maritime lien for advances made to the master of the vessel. Here we find that the claimant was not the special agent and thus does not come within the holding of *Rodriguez* v. *British M/V G. K. Dauntless*. We find that in making the advances claimant did not rely on the credit of the ship itself but rather a maritime lien. See *The Fort Gaines*, 24 F. 2d 438; *The Europa*, 1 F. 2d 684; *The West Irmo*, 1 F. 2d 87; *The American Star*, 11 F. 2d 479; *The M. Vivian Pierce*, 48 F. 2d 644; *The Maret*, 145 F. 2d 431. See also *The Accutnay*, 278 F. 2d 999, and *The Odysseus III*, 77 F. Supp. 297."

With regard to a mortgage of stock, see the *Poras Claim* (*ibid.*, p. 58). The claimant was pledgee of 102,163 shares of stock of " Drach ", a Yugoslav corporation which was confiscated by the Yugoslav Government. The Commission *held* " that a security interest of the kind so vested in the claimant may properly be regarded as a right and interest in and with respect to property, within the meaning of the Yugoslav Claims Agreement of 1948. The Commission has adopted a similar principle in its determination of claims based upon ownership of mortgages on real property taken by the Government of Yugoslavia. Consequently, if the claimant's rights as pledgee had continued to exist until the date of confiscation of Drach, a claim arising from the taking of the assets represented by the indicated shares of stock would be compensable under the Agreement."

State Responsibility—Claims—*Non bis in idem*—Exclusion of Claims Where Claimant Already Compensated by Domestic Tribunal of Defendant State—Exclusion of Claims Based on Refusal to Permit Transfer of Funds Out of Country.

NARTNICK CLAIM.

United States, International Claims Commission.[1]

THE FACTS.—The claimant, a United States citizen, was the owner of certain land in Yugoslavia. In 1945, a right of way across her land was compulsorily acquired by the Yugoslav authorities in connection with the construction of a railway line. On February 26, 1946, the claimant gave a power of attorney to one Kiferle, authorizing him to " represent me in all legal and administrative matters before state and provincial authorities. . . . He can conclude compromises and stipulations of any kind. . . . *He can accept money and monetary values and give receipts for full value* . . . give his consent to arbitration proceedings . . . authority for all kinds of deeds . . . and in general he is authorized to do everything he deems necessary in all legal and administrative matters to do for me. . . . In case of dispute he is entitled to take action at the appropriate court in Ljubljana." (Italics supplied). On December 12, 1947, the District Appropriation Commission in Ljubljana awarded 148,950 dinars to the claimant through Kiferle, her representative, who, as such, received the money on May 29, 1948. Owing to Yugoslav exchange control restrictions, the claimant was unable to obtain the amount of the award in United States dollars. She now claimed $2,979, the amount of the award, under the Agreement of July 19, 1948, between the Governments of the United States and Yugoslavia regarding pecuniary claims of the United States and its nationals.

Held: that the claim must be rejected. To admit the claim now would be to pay the claimant twice for the same property. In any event, refusal to permit transfer of the compensation money to the United States would not base a claim under the Agreement of 1948.

The Commission said: " Mr. Kiferle advises that claimant, his cousin, requested that he represent her in anticipation of the condemnation proceedings and, for that purpose, sent him the described power of attorney; that claimant, upon being advised of the award, requested that the funds be sent to her in the United States, but she was advised that the transfer could not be effected and that, upon claimant's visit to Ljubljana in 1952, her aggrievement apparently was directed only at her inability to obtain compensation in United States dollars. Mr. Kiferle also is of the opinion that the amount paid was fair and reasonable. It follows that the claimant is in the position of requesting payment twice for the same property.

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[1] The exact date of the decision does not appear from the Report as published in 1955. It would seem that the decisions of the Commission were given in the years 1951–1954.

For the establishment and functions of the Commission see *supra*, p. 55, n. 1.

" In view of the foregoing, and the matters of record incident to this matter, the Commission finds that the award was paid to claimant's duly authorized representative and that, upon acceptance thereof, the condemnation proceedings were fully completed and satisfied.

" Claimant's reference to dinar devaluation is without merit. There is no question here as to a conversion of pre-war to post-war dinars at a ratio unfavorable to claimant. She values the property at 148,950 dinars and was paid that amount. Finally, any suggestion that the limitations upon the removal of funds from Yugoslavia to the United States gives rise to a claim under the Agreement of July 19, 1948, was treated in considerable detail in the *Claim of Anton and Frances Tabar*,[1] and need not be repeated here. As the Commission there stated, '. . . the refusal or failure to permit a transfer to the United States of claimants' deposit does not amount to " nationalization " or " other taking " of property or of rights in and with respect to property.' "

[Report: *Settlement of Claims*, 1949–1955, p. 61.]

State Responsibility—Claims—Principle of Unjust Enrichment—Exclusion of Claim Compensated by Another Commission—Admission of Claim of Shareholder for Balance of His Loss Not Comprised therein—Calculation of Loss—Rate of Exchange.

MAYER CLAIM.

United States, International Claims Commission.[2]

THE FACTS.—The claimant was the holder of approximately 9,000 shares in Trepca, Ltd., a company incorporated in the United Kingdom. Certain property belonging to the Company in Yugoslavia was taken by the Yugoslav Government. The Company filed a claim with the Foreign Claims Commission set up under the Agreement of December 23, 1947, between the Government of the United Kingdom and the Government of Yugoslavia, and received payment from that Commission. The claimant now claimed some $29,000 under the Agreement of July 19, 1948, between the Governments of the United States of America and Yugoslavia regarding pecuniary claims of the United States and its nationals.

Held (in a preliminary decision): that the claim must be rejected. Stockholders of a foreign corporation were bound by the action of that corporation in filing a claim with a foreign commission for property taken by the Government of Yugoslavia, and a stockholder such as the claimant had no standing to prosecute a claim with the Commission.

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[1] [See *International Law Reports*, 1953, p. 242, *sub nom. Tabar Claim* No. 3.]

[2] The exact date of the decision does not appear from the Report as published in 1955. It would seem that the decisions of the Commission were given in the years 1951–1954.

For the establishment and functions of the Commission see *supra*, p. 55, n. 1.

After hearing additional evidence, to the effect that the claimant restricted his claim to an award from the United States fund compensating him for the *balance* of his *loss* not compensated to the British corporation,

Held: that the claim must be allowed.

The Commission said: " The next question to be determined is what is the balance of the loss not compensated to the British corporation for which claimant asks an award for his share thereof from the $17,000,000 fund under the Yugoslav Claims Agreement of 1948? We are of the opinion that claimant is entitled only to what appears to be his proportionate loss for which the British corporation has not obtained and will not receive compensation from the British-Yugoslav Fund. He is not entitled to the entire amount of his proportionate share in the value of the property taken by the Government of Yugoslavia, because the corporation received an award from the British Commission for that value and it can be reasonably expected that it will collect at least part of such award. The benefit claimant will directly or indirectly receive from such collection is reflected in any dividends which may be declared and paid by the corporation and in the increased value of the shares of stock. Although the claimant admits that he should be compensated for only his proportionate share in the value of the property taken by the Government of Yugoslavia less any and all possible payments made to Trepca by the British Commission, he has made no effort to calculate his actual loss.

" In order to ascertain claimant's loss we must resort to the quotations of Trepca's shares of stock at the Stock Exchange in London because we have no other material on hand which would give us a better foundation to establish such loss. Claimant furnished us with the records of prices and dividends of the Trepca shares in London for the years 1936 to 1953 and from these records we find that in 1945, prior to the established policy of the Government of Yugoslavia to socialize or nationalize industrial properties, the average quotation for one Trepca share was 10s. 3¾d. In 1947, after the nationalization of all industrial properties in Yugoslavia, the average quotation of a Trepca share was 7s. 0d. Hence the loss claimant has suffered in the opinion of the business community and by the standards adopted by people who deal in securities amounted to 3s. 3¾d. per share. According to the Statistical Yearbook for the year 1938 of the United Nations Organization (p. 375) the exchange rate of the pound sterling during the years 1945 to 1947 with respect to the United States dollar was $4.03 for £1 sterling. Consequently, the amount of the loss of 3s. 3¾d. in United States dollars was $0.67

per share at the time when the nationalization of Trepca's property took place."

[Report: *Settlement of Claims*, 1949–1955, p. 60.]

State Responsibility—Claims—Claim by Shareholder in Corporation Owning Property Taken—Set-off of Debt Owed by Corporation to Shareholder—Calculation of Amount of Such Debt—Rate of Exchange.

AMERICAN & EUROPEAN AGENCIES INC. CLAIM.

United States, International Claims Commission.[1]

THE FACTS.—American & European Agencies Inc., a corporation organized under the laws of the United States, claimed $1,538,753 in respect of debts owing to it by Fallersa, an Italian corporation, in which it held certain stock. Fallersa owned certain property which was taken by the Government of Yugoslavia.

Article 4 (c) of the Agreement of July 19, 1948, between the Governments of the United States of America and Yugoslavia regarding pecuniary claims of the United States and its nationals, provides:

" The Government of Yugoslavia recognizes the obligation of the successor enterprises created by it with respect to debts valid under Yugoslav law which were incurred prior to the nationalization or other taking, for the benefit of the enterprises nationalized or otherwise taken, provided, however, that there shall be deemed fully settled and discharged all debt obligations of enterprises, nationalized or otherwise taken, owing to nationals of the United States whose claims against the Government of Yugoslavia with respect to the nationalization or other taking of such enterprises are claims which are fully settled and discharged by this agreement; . . ."

The claimant Corporation contended that in determining the net worth of the Italian corporation debts owed to it by such company should not be taken into consideration in computing net worth.

Held: that the contention must fail; the debts owing by Fallersa to the claimant must be taken into account as outstanding obligations and deducted from the value of the property taken.

The Commission said: " While the Commission ordinarily bases its findings as to the value of stock on 1938 values, the special circumstances here inhibit this practice. Neither the factory nor Fallersa was in existence in 1938 and consequently there are no financial records of that year, which can be of assistance in determining the net worth of the company. For this reason, we have decided to base our finding as to the value of the stock on its book value on the date of taking, September 15, 1947, and convert such lire values into dollars at the official rate of exchange. Some precedent for this procedure is found *In the Matter of the Claim of Stefan and Anna Johsz* (Decision No. 1420), where we converted a bank account, established in 1942, from dinars into dollars at the official rate of exchange at the date of taking.

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[1] The exact date of the decision does not appear from the Report as published in 1955. It would seem that the decisions of the Commission were given in the years 1951–1954.

For the establishment and functions of the Commission see *supra*, p. 55, n. 1.

" The book value may be determined from two sets of records filed by claimant, certified copies of Fallersa's balance sheets and certified copies of summary balance sheets published in the Official Gazette of the Allied Military Government [showing] the book value of one share of Fallersa stock [for the years 1945–1948 inclusive].

" We conclude from all the evidence that the value of 1 share of stock of Fallersa on September 15, 1946, was 350 lire. Converting that figure into dollars at the rate of 350 lire to the dollar, the legal rate at such time (see Lutz, F.A. and V.C., *Monetary and Foreign Exchange Policy in Italy* (1950), appendix, table XI),[1] we arrive at $1 as the value of a share of Fallersa stock on the date of taking. Since claimant owned 12,320 shares of stock of Fallersa, the value of such stock was $12,320.

" Claimant takes the position that debts of Fallersa owed to it should not be taken into consideration in computing net worth. Claimant is apparently relying on Article 4 (c) of the Agreement . . . and expressly is relying on the letter of July 19, 1948, from the Secretary of State to the Yugoslav Ambassador . . ., which obviously was referring to the Article 4 (c) provisions concerning debts owed to the owner of an enterprise.

" There is no need to consider the validity of claimant's argument with respect to the effect on such debts of Article 4 (c) or the letter of July 19, 1948, for that Article and letter have no application to the situation at hand. Article 4 (c) applies expressly and exclusively to debts of enterprises nationalized or otherwise taken by Yugoslavia. The debt here runs from Fallersa, an Italian corporation which has never been nationalized or taken by Yugoslavia. It is also manifest that the letter of July 19, 1948, can be referring only to enterprises nationalized or taken by Yugoslavia, when speaking of the discharge of debts, for the Governments of the United States and Yugoslavia would, of course, have no competence to agree on the discharge of a debt of an Italian corporation still in existence on July 19, 1948, and never nationalized or taken by Yugoslavia. We do not consider, therefore, that there is merit to claimant's argument in this respect, and it was proper to consider debts owed by Fallersa to claimant in computing net worth, for they were outstanding obligations on the day of taking and, indeed, are currently outstanding obligations."

[Report: *Settlement of Claims*, 1949–1955, p. 67.]

[1] It is noted that the " Legal Free Rate " was 667 lire, the " Middle Rate " 508 lire, and the " Black Market Rate " 665 lire to the dollar in September 1947.

State Responsibility—Claims—Beneficial Ownership of Property —Stock Held by Nominee—Burden of Proof of Interest.

Knesevich Claim.

United States, International Claims Commission.[1]

The Facts.—Gus Knesevich, a United States citizen, claimed to be beneficial owner of 4,273 shares in the Dionicke Pivaro Sarajevo Brewery, a Yugoslav corporation which was nationalized by the Yugoslav Government. He claimed $10,500, the value of the stock, under the Agreement of July 19, 1948, between the Governments of the United States of America and Yugoslavia regarding pecuniary claims of the United States and its nationals. According to his statement of claim, " Claimant's interest arises as beneficial owner of stock held by his brother Milos Knesevich, agent . . . Claimant purchased these securities by remitting funds to his brother, Milos Knesevich, during the years 1930 to 1940."

Held (in a preliminary decision): that the claim must fail. The claimant had not discharged the burden of proof of his beneficial ownership of the shares.

The Commission said: " The claimant acknowledges that nominal ownership of the stock has never been in him; and it is clear that he has never had possession of the stock certificates. . . .

" A claim of beneficial ownership of personal property, the legal title to which is in some other person, should be supported by proof as clear, consistent and convincing as might reasonably be expected under all of the circumstances. The Commission is of the opinion that such proof, the burden of which rests upon the claimant, has not been produced in connection with this claim. To support his asserted beneficial ownership, claimant has attempted to prove that he provided the funds for the purchase of the stock. The evidence submitted, however, is contradictory and, in the judgment of the Commission, inadequate. . . .

" The claimant has submitted some documentary evidence that he transmitted to or for the account of his brother [certain sums of money between 1939 and 1941]. The [last] two payments . . . were made after the years 1930 to 1940 during which the stock is said to have been acquired. There is no indication on any of these documents, moreover, of the nature or purpose of any of these payments. The claimant explains the absence of records of additional and prior payments by the statement that, in 1944, all of his records ' from 1927 through 1943 were destroyed including any that had a bearing on the subject funds '. These shares of stock are said to have been acquired by the claimant through his brother during the 10 years between 1930 and 1940. It would seem reasonable to believe that at some time during that period, when private, international communication was quite free, the claimant would have received from his brother some written communication reflecting the acquisition of at least some of these shares of stock and something in writing by way of acknowledgement of the claimant's interest therein. This would be the kind of record which, in such a transaction, a reasonably prudent businessman would be expected to retain. However, no such evidence has been submitted to the Commission.

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[1] The exact date of the decision does not appear from the Report as published in 1955. It would seem that the decisions of the Commission were given in the years 1951–1954.

For the establishment and functions of the Commission see *supra*, p. 55, n. 1.

" In further supporting his claim of ownership, the claimant also relies upon (a) certain correspondence [with a Swiss bank] and (b) a letter, dated September 10, 1946, from him to [a bank] in Sarajevo, in which letter he asserted ownership of the shares of stock in question . . .; no specific reference was made in [the] correspondence [with the Swiss bank] to the stock; . . . The letter to the Sarajevo Bank . . . was not written until September 10, 1946, after confiscation and the other processes of taking were well under way in Yugoslavia, and at least 6 years after the stock is said to have been fully acquired. Apparently, the letter was the first notification by the claimant to this bank that he had any claim of interest in these shares of stock."

The Commission considered the significance and weight of certain other correspondence which might be said to have supported the claimant's contention, and concluded: " Upon all the evidence, the Commission is of the opinion that, at least for the purposes of this kind of claim, the proof is not sufficient to satisfy the claimant's burden of proof."

The claimant then produced additional evidence, and after a further hearing,

Held: that the claim must be allowed. The Commission said: " Such additional documentary material includes letters to the claimant and his brother from the [Swiss Bank] through which, it appears, some of the shares were acquired, and letters to the claimant from other persons now in Yugoslavia who were apparently familiar with the circumstances surrounding the purchase of these shares by Milos Knesevich and of the relationship between him and his brother, the claimant, respecting the true ownership of the shares.

" Upon consideration of all of such additional evidence, the Commission is now satisfied that the claimant has established his claim of beneficial ownership to the shares of stock in question, and that such ownership existed at the time of the taking of the corporation."

[Report: *Settlement of Claims*, 1949–1955, p. 64.]

State Responsibility—Claims—In Respect of Nationalization of Undertakings—Evidence of Nationalization—Critical Date.

See p. 293 (*Cisatlantic Claim*).

State Responsibility—Claims—Debt Owed to Stockholder by Nationalized Corporation—Compensation for Non-payment of Debt Excluded by Compensation for Loss Caused by Nationalization.

See p. 291 (*Howard Claim*).

II.—Nationality of Claims

State Responsibility—Claims—Nationality of Claims—Loss of Nationality on Decease of Claimant.

Bogovic Claim.

United States, International Claims Commission.[1]

The Facts.—This was a claim by seventeen persons entitled to the estate of Thomas Bogovic, a naturalized citizen of the United States of America, who died on May 27, 1947. All the claimants were Yugoslav nationals resident in Yugoslavia. Part of the deceased's property in Yugoslavia had been taken by the Government of Yugoslavia before the date of the death of Thomas Bogovic; part between that date and July 19, 1948, the date of the signing of the Agreement between the Governments of the United States of America and Yugoslavia regarding pecuniary claims of the United States and its nationals; and part after the date of that Agreement. The claimants now claimed some $76,000 compensation in respect of such takings.

Held: that the claim must fail; on the death of Thomas Bogovic in 1947 it had lost its American nationality and the United States would therefore not espouse it.

The Commission said: " Article I (a) of the agreement provides for the ' settlement and discharge of all claims . . . on account of the nationalization and other taking by Yugoslavia of property and of rights and interests in and with respect thereto, which occurred *between September 1, 1939* and the date hereof,' namely, *July 19, 1948.* Thus, it is clear that the Agreement does not cover, and claimants could not be compensated for property taken after July 19, 1948.

" Articles 1 (a) and 2 of the Agreement provide compensation to American *nationals* who were such at the time *their* property was taken. If the property for which compensation is sought was taken after the death of Thomas Bogovic, the Government of Yugoslavia did not take his property, but only such rights or interests therein which passed to his devisees and legatees who are not American nationals. Thus, it is clear that they could not be compensated for any property which was taken between May 27, 1947, and July 19, 1948.

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[1] The exact date of the decision does not appear from the Report as published in 1955. It would seem that the decisions of the Commission were given in the years 1951–1954.

For the establishment and functions of the Commission see *supra*, p. 55, n. 1.

" The Agreement is not definite as to whether Yugoslav citizens who acquire a right or interest in property which was owned by an American national at the time it was taken shall be compensated. In order to resolve this question it is, therefore, necessary to look to the negotiations leading up to the Agreement, the International Claims Settlement Act of 1949, and any other available data. The Commission obtains no assistance from the history of the negotiations. The International Claims Settlement Act of 1949 provides in section 4 (a) ' (1) the provisions of the applicable claims agreement as provided in the subsection; and (2) the applicable principles of international law, justice and equity '. Thus, the Commission feels impelled to follow ' the applicable principles of international law ' in deciding this question.

" It is a well-settled principle of international law that to justify diplomatic espousal a claim must be national in origin; that it must, in its inception, belong to those to whom the state owes protection and from whom it is owed allegiance (Borchard, *The Diplomatic Protection of Citizens Abroad*, p. 666). Further, although the national character will attach to a claim belonging to a citizen of a state at its inception, the claim ordinarily must continue to be national at the time of its presentation, by the weight of authority (Borchard, *supra*, p. 666), and there is general agreement that it have a continuity of nationality until it is filed (Feller, *The Mexican Claims Commission*, p. 96). That it must continue its national character until its settlement or decision will also be shown by cases cited subsequently.

" As a rule, the Government of the United States refuses to espouse claims which have not continued to be impressed with American nationality from the date the claim arose to the date of its settlement (Hackworth, *Digest of International Law*, vol. 5, p. 804). Thus, in its form, ' Application for the support of claims against foreign governments ', issued by the Department of State on May 19, 1919, and revised on October 1, 1924, the following language appears in paragraph 6:

' Moreover, the Government of the United States, as a rule, declines to support claims that have not belonged to claimants of one of these classes [those who have American nationality or who are otherwise entitled to American protection] from the date the claim arose to the date of its settlement.' Quoted in Eagleton, *The Responsibility of States in International Law*, page 269.

"The practice of the State Department in conformity to this principle is illustrated in a letter of August 11, 1926, addressed to an attorney of a company in connection with a claim allegedly incurred by a requisition by Italian authorities. The letter stated:

'. . . It is assumed that this insurance company was a foreign corporation, in which case there would be a break in the continuity of American ownership of this claim . . . The Government of the United States, as a rule, declines to present claims through diplomatic channels that have not belonged to American claimants from the date the claim arose to the date of its settlement.' Quoted in Hackworth, *supra*, page 805.

"Similarly, where an American claimant died subsequent to the submission of his claim to the Japanese Government, leaving his Japanese wife as his sole heir and as executrix under his will, the Department of State refused to espouse the claim longer since 'ownership of the claim' had 'passed to . . . [the] Japanese wife.' (M. S. Department of State, file 494.11 Barstow, Ebenezer, cited in Hackworth, *idem.*)

"The rule of continuity of nationality in a claim has also been followed by international tribunals. The United States-Mexican and Spanish-Mexican Commissions followed this traditional rule without deviation, and the 'rule is implicit in the provision in all the rules of procedure requiring the nationality of the owner or owners of the claim from the time of origin to the date of filing to be set forth in the memorial' (Feller, *supra*, p. 96). And the British-Mexican Commission stated that 'a claim must be founded upon an injury or wrong to a citizen of the claimant Government, and that title to that claim must have remained continuously in the hands of citizens of such Government until the time of its presentation for filing before the Commission.' (Case of *F. W. Flack*, Decisions and Opinions of Commissioners, p. 80 at 81, cited in Feller, *idem.*) Following this principle in the case of *Edgardo Trucco* (Decision No. 1, unpublished), the latter Commission dismissed a claim for damage to property which had belonged to a British subject at the time of the injury but which had been left by will to a Mexican national prior to the filing of the claim. (Cited in Feller, *idem.*) Further, both the British-Mexican Commission in the case of *Minnie Stevens Eschauzier* (Further Decisions and Opinions, p. 180[1]) and the French-Mexican Commission in the case of *Maria Guadalupe A, Vve Markassuza* (Sentence No. 38, unpublished) required continuous nationality not only until the date of filing but subsequently to the date of the award. (Cited in Feller, *supra*, p. 97.) In the former case it was stated at page 182:

'A state may not claim a pecuniary indemnity in respect of damages suffered by a private person on the territory of a foreign state unless the injured person was its national at the moment when the damage was caused and retains its nationality until the claim is decided.

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[1] See *Annual Digest*, 1931–1932, Case No. 110.]

'Persons to whom the complainant state is entitled to afford diplomatic protection are for the present purpose assimilated to nationals.

'In the event of the death of the injured person, a claim for a pecuniary indemnity already made by the state whose national he was can only be maintained for the benefit of those heirs who are nationals of that state and to the extent to which they are interested.' (Quoted in Ralston, *supra*, p. 77.)

And in the *Gleadell* case (Decisions and Opinions, 55[1]) a claim of British origin which did not preserve that character until its presentation before the same Commission, as the residuary legatee of the claim was an American woman, was rejected even though the executor of the testator's estate was a British subject. (Cited in Ralston, *idem*, and in Hackworth, *supra*, p. 805.)

"The instant claim lost its American nationality upon the death of Thomas Bogovic on May 27, 1947, and thereafter was impressed with Yugoslav nationality. It is clear, then, that under the policy of the United States this claim would no longer be espoused by it against Yugoslavia. Further, there is ample authority under the decisions of international tribunals that a claim must have a continuous national character from the date of its origin to the date of settlement.

"We are satisfied that the negotiators of the Agreement of July 19, 1948, between the Governments of the United States and Yugoslavia, were aware of the policy of the United States Government and established principles of international law and had they desired to depart from them would have inserted appropriate provisions in the Agreement. Since they did not, we conclude that a claim to be within the jurisdiction of this Commission must be owned by American nationals from the date the claim arose to the date the Agreement was signed.

"For the foregoing reasons this claim is denied in its entirety."

[Report: *Settlement of Claims*, 1949–1955, p. 55.]

Note.—See also the *Halwax Claim* (*ibid.*, p. 58), where the claimant had acquired derivative citizenship of the United States of America when her husband was naturalized in 1920, but subsequently returned to Yugoslavia, her place of birth, and lost her United States citizenship in 1946, under Sections 406 and 409 of the Nationality Act of 1940. In the meantime, in 1945, certain of her property had been taken by the Yugoslav Government. In 1953 she filed a petition for naturalization. The Commission *held* that her claim must be rejected as she was not a citizen of the United States from the date her claim arose to the date of the signature of the Claims Agreement in 1948.

And see the *National Investors' Fund Claim* (*ibid.*, p. 76), where the Government of Yugoslavia had taken a Yugoslav company in which the

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[[1] See *Annual Digest*, 1929–1930, Case No. 117.]

claimant company held stock. The evidence disclosed that two individuals were the sole beneficial owners of the claimant Company and that these two individuals were nationals of France until they became naturalized citizens of the United States on December 9, 1946. The Commission *held* that the claim must be rejected. According to Article 2 of the Yugoslav Claims Agreement of 1948, the nationality requirements of a juridical person as a claimant for the nationalization or taking by Yugoslavia of property or rights and interests in and with respect to property was governed by two factors: (1) the juridical person must be organized under the laws of the United States, or a constituent State or other political entity thereof; and (2) twenty per cent. or more of any class of its outstanding securities must be owned at the time of nationalization or taking by individual nationals of the United States, directly, or indirectly through interests in one or more juridical persons of whatever nationality, or otherwise.

The claimant Corporation furnished evidence that it was organized under the laws of Delaware in 1937, and consequently it fulfilled the first requirement. In interpreting the second requirement, the Commission had previously ruled[1] that 20 per cent. or more of any class of a corporate claimant's securities must have been beneficially owned by individual nationals of the United States. Accordingly, this claimant did not become a national of the United States, as that term was defined in Article 2 of the Agreement, until December 9, 1946, which was subsequent to the taking of the Yugoslav company on December 5, 1945.

Claims—Nationality of—Rule of Continuity of Nationality—On Assignment of Claim.

See p. 161 (*Perle Claim*).

Claims—Nationality of Claims—Ownership by Nationals of Specified Proportion of Securities of Claimant Corporation.

See p. 293 (*Cisatlantic Claim*).

Claims—Nationality of Claims—Claimant Naturalized after Nationalization of Corporation by Defendant State.

See p. 293 (*Cisatlantic Claim*).

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[1] See the *Westhold Corporation Claim* (*Settlement of Claims*, 1949–1955, p. 40; *International Law Reports*, 1953, p. 226).

III.—Assignment of Claims

State Responsibility—Claims—Assignment of—Assignment of Interest of Deceased Claimant—Nationality of Claims—Rules of Continuity of Nationality.

PERLE CLAIM.

United States, International Claims Commission.[1]

THE FACTS.—Elizabeth Schmidt, *née* Perle, the owner of an interest in certain property which was taken by the Yugoslav Government, was admitted to United States citizenship in 1941. She died in 1949, leaving a husband and a daughter who were United States nationals. In 1952, the husband assigned to the daughter all rights which he might have with respect to his deceased wife's claim under the Agreement of 1948 between the Governments of the United States of America and Yugoslavia regarding pecuniary claims of United States nationals.

Held: that the daughter was entitled to prosecute the claim of her deceased mother.

The Commission said: " . . . At the time of taking of the property, Elizabeth Schmidt, *née* Perle, was a citizen of the United States, and her claim was settled by the Claims Agreement of 1948. [The Commission here recited the relevant facts, and concluded]: . . . We find, therefore, that [the daughter] is the lawful heir and assignee of her deceased mother's claim."

[Report: *Settlement of Claims*, 1949–1955, p. 50.]

NOTE.—See also the *Davidson Claim* (*ibid.*, p. 50), in which the claimant, a United States national, was entitled by inheritance to a one-fourth interest in certain property taken by the Yugoslav Government, and produced assignments to her by the owners (also United States nationals) of the other three shares in the property, of their interest therein. The Commission *held* that the claimant had duly acquired the additional three-fourths interest in the property in question.

See, however, the *Popov Claim* (*ibid.*, p. 50), by the assignee of certain property under an assignment made in 1947, the assignor not being a national of the United States. It was *held* that the claim must fail, the Commission saying: " The agreement of July 19, 1948, between the Governments of the United States and Yugoslavia settled ' all claims of nationals of the United States ' for the ' nationalization or other taking by Yugoslavia of property ' (Art. 1), who were nationals of the United States ' at the time of nationalization or other taking ' (Art. 2). It expressly excluded those ' who did not possess such nationality at the time of nationalization or other taking ' (Art. 3). Claimant could not derive any greater rights than his assignor had under the aforementioned agreement of July 19, 1948. Since, at the time of taking, the assignor was not a national of the United States, that part of the claim based upon the assignment was not settled by the agreement of July 19, 1948, and is not, therefore, within the jurisdiction of this Commission."

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[1] The exact date of the decision does not appear from the Report as published in 1955. It would seem that the decisions of the Commission were given in the years 1951–1954.

For the establishment and functions of the Commission see *supra*, p. 55, n. 1.

D—DAMAGES (MEASURE OF DAMAGES)

I.—Award of Damages in General. Grounds for Awarding Damages

State Responsibility—Damages—Grounds for Awarding Damages —Basis of Calculation—Claim for Depreciation in Value of Property Due to War-time Conditions.

DUNCAN CLAIM.

United States, International Claims Commission.[1]

THE FACTS.—The claimant was the owner of 500 shares of stock in the First Croatian Savings Bank of Zagreb, Yugoslavia. At the time of the conclusion of the Agreement of July 19, 1948, between the Governments of the United States of America and Yugoslavia regarding pecuniary claims of the United States and its nationals, the shares were worthless. Duncan lodged a claim for compensation in the sum of $8,925, alleged to be the original value of the shares, contending that their depreciation was due to losses from war, currency fluctuations, etc.

Held: that the claim must be rejected. The reasons put forward for the loss in value of the shares were not such as would bring the claim within the Compensation Agreement of 1948.

The Commission said: " . . . the problems and difficulties presented by this claim, and approximately forty other claims of a similar nature, and our doubts concerning their legal validity, are so great that it is impracticable for the Commission even fully to explore the several theoretical possibilities which exist in order to determine initially whether a likely basis for a claim might be created. The situation of the Yugoslav banks and banking system prior to the war, the war itself and resulting inflation, destruction of property, currency changes, and the like, are some of the reasons why independent investigation of the liquidation data furnished by the Government of Yugoslavia, if undertaken, likely would not be productive.

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[1] The exact date of the decision does not appear from the Report as published in 1955. It would seem that the decisions of the Commission were given in the years 1951–1954.

For the establishment and functions of the Commission see *supra*, p. 55, n. 1.

"For example, we know from data and records of the Commission, and our own investigations in Yugoslavia, that following the boom of the '20's, Yugoslav banks suffered especially from two depressive causes: (1) The agricultural crisis occasioned a series of moratoria after 1931 with the reduction of farm debts by 50 percent (in December, 1939, 353 banks, out of a total of approximately 600, were under moratorium); and (2) the general industrial decline which made it impossible for many banks which had invested in hotels, lumber and paper mills, electric plants, and other industrial enterprises, to liquidate such investments without great loss. (In the instances of the First Croatian Savings Bank of Zagreb, the Government of Yugoslavia reports that 'from 1931 on no dividends were paid. Consequently, from 1935 on these shares were not marketable.' We also know that the war caused great inflation in Yugoslavia; that former Yugoslav currency was converted into 'occupation currency' which in turn was reconverted into post-war Yugoslav currency; that during the war approximately half of Yugoslav industry was destroyed by war activity, with the result that banking institutions which had invested in such enterprises were left with diminished or destroyed security for such investments and that there were other economic forces and factors which impaired the financial condition of all financial institutions.

"It is thus apparent that, even if data were available, any attempted appraisal of the net worth of any such bank at a time preceding the war would encounter the difficulty of assets seemingly over-depressed in value, while post-war valuations are affected by the aspect of inflation, war currencies, and other war-connected events. Moreover, this is not a situation wherein we might speculate whether the banks might have attained profitable operations during a period of sound reconstruction. The incidence of the war, with its involuntary effects, makes any such inquiry of little significance.

"However, in an effort to provide as much assistance as possible, the Commission undertook, through its own investigators, to discover whether, even assuming a nationalization of all private banks by the Government of Yugoslavia, proper valuation data existed upon which awards could be made. It was ascertained that, first, proper records, at least of the kind which would be needed for an objective examination, either have been destroyed or for other reasons very likely would not be available. Second, even if all necessary records could be obtained, a monumental task of appraisal and valuation would be presented. Thus, an attempted evaluation of every piece of property and property right and interest, including industrial investments, of every bank involved in the claims, would take years of work by a large staff of experts. Obviously, such a course would be wholly impracticable. At least, it would constitute a burden which this Commission could not undertake.

"Finally, even under the most favorable circumstances, the expenses of proving a claim of this kind would, in many instances, be wholly out of proportion to the property rights claimed. In the instances of this claim, ownership of 500 shares of stock is asserted. According to *Compass*, 1940 issue, a financial publication, the First Croatian Savings Bank, Inc., then had outstanding 150,000 shares of common stock at 500 dinars par value each, and 40,000 shares of preferred stock at 500 dinars each. Assuming claimant's asserted shares to have been common stock, an ownership interest of 0·3 percent would need to be balanced against the expense and effort of evaluating an entire banking institution. In the circumstances, the claim must be denied upon the ground that the claimant has failed to present a proper basis upon which an award may be made."

[Report: *Settlement of Claims*, 1949–1955, pp. 55 and 62.]

II.—Indirect Damage and Damages for Loss of Profits

State Responsibility—Damages—Damages for Loss of Profits.

DORNER CLAIM.

United States, International Claims Commission.[1]

THE FACTS.—The claimant, a United States citizen, was the owner of certain property in Yugoslavia which had been taken by the Yugoslav Government. He claimed the sum of $9,000 under the Agreement of July 19, 1948, between the Governments of the United States of America and Yugoslavia regarding pecuniary claims of the United States and its nationals, in respect of profits arising from the property which he estimated that he had lost as the result of the taking.

Held: that the claim must be rejected as not coming within the Claims Agreement of 1948.

The Commission said: " The Commission, in its determination of claims against Yugoslavia, is directed by the International Claims Settlement Act of 1949 to apply (1) the terms of the agreement with that country and (2) the applicable principles of international law, justice and equity, in that order. The agreement between the Governments of the United States and Yugoslavia contains no specific provision regarding loss of use of property, loss of profits, and the like. Generally, international and domestic arbitral tribunals in the determination of international claims allow compensation for indirect damages such as loss of use of property, loss of profits and the like, if such losses are reasonably certain and are ascertainable with a fair degree of accuracy. They do not allow compensation for indirect damages if they are conjectural or speculative or not reasonably certain or susceptible of accurate determination. See *Diplomatic Protection of Citizens Abroad*, Edwin M. Borchard, sections 172, 173, and cases cited therein.

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[1] The exact date of the decision does not appear from the Report as published in 1955. It would seem that the decisions of the Commission were given in the years 1951–1954.

For the establishment and functions of the Commission see *supra*, p. 55, n. 1.

" We are of the opinion that it has not been proven that it was reasonably certain that the profits expected or any profits would have been realized by claimant. The claim for such profits must therefore be denied. However, claimant may be compensated in terms of interest for the loss of the use of the compensation he was entitled to receive on the date the property was taken, from the date of the taking to the date of payment by the Government of Yugoslavia. Both the Agreement with Yugoslavia and the International Claims Settlement Act contemplate the allowance of interest by the Commission for the delay in payment of compensation by the Government of Yugoslavia."

[Report: *Settlement of Claims*, 1949–1955, p. 53.]

NOTE.—See also the *Segoe Claim* (*ibid.*, p. 53), in which the Commission stated: " It is obvious that no claim can be made for loss of income and other benefits occurring after the nationalization or other taking by the Yugoslav Government."

And see the *Hollder Claim* (*ibid.*, p. 53), in which the claim was rejected, the Commission saying: " The claimants also ask 277,000 dinars for loss of income from their land from November 1944 to 1951. The claimants have filed no evidence in support of this item of the claim. The amount of the income that the claimants might have received from the land is conjectural and speculative and not susceptible to accurate determination. Moreover, the agreement between the Governments of the United States and Yugoslavia does not specifically provide for the loss of income from property. Under the circumstances, the claim for loss of income is denied. However, claimant Jacob Hollder was entitled, on the date his property was taken, to a definite amount, namely, the value of the property on that date. Thus he has had the loss of the use of the money he was entitled to receive on February 6, 1945. Such loss of use can be compensated for in terms of interest and it is the opinion of the Commission that interest thereon be allowed."

State Responsibility—Measure of Damages—Loss of Profits.

See p. 141 (*Schappe Spinning Mill Claim*).

PART VI

THE INDIVIDUAL IN INTERNATIONAL LAW

A—IN GENERAL

I.—Position of Individuals in International Law. Human Rights and Freedoms

[*See also* PART I, INTERNATIONAL LAW IN GENERAL: IV, Relation to Municipal Law; *and* PART VIII, TREATIES: IX, Operation and Enforcement of Treaties.]

Position of Individuals in International Law—Effect of Treaties on Individuals—Distinction between Treaties and Agreements—The Law of Holland.

INSTITUT NATIONAL DES APPELLATIONS D'ORIGINE DES VINS ET EAUX-DE-VIE *v.* METTES.

Holland, Supreme Court. December 10, 1954.

THE FACTS.—In October 1950, the defendant sold bottles labelled "Cognac Vieux" the contents of which were not French cognac. The plaintiffs, a French company, brought an action before the District Court of The Hague for the purpose of obtaining an order declaring, among other things, the unlawfulness of introducing into commerce, under the name of "cognac", alcoholic beverages not produced in France. The plaintiffs based their action mainly upon Article 11 of the French-Netherlands Commercial Treaty of May 28, 1935. On that date the French and Netherlands Governments had entered into an agreement under which they considered the Treaty as provisionally being in operation between the two countries as from May 31, 1935. The Treaty was approved by the Netherlands States-General (*i.e.*, Parliament), but it was never ratified by France. The agreement of May 28, 1935, however, which had been communicated to the States-General together with the bill for the approval of the Treaty, remained operative from May 31, 1935, and it was published by the Netherlands Government as late as 1953. In 1935 there was in force the Netherlands Constitution as amended in 1922, which provided, in Article 58:

> "The King shall conclude and ratify all treaties with foreign powers.
>
> "Unless the King shall have reserved to himself by law the right to ratify a treaty, that treaty shall not be ratified until it shall have received the approval of the States-General.

"Adherence to and denunciation of treaties shall be effected by the King solely by virtue of laws.

"Other agreements with foreign Powers shall be communicated to the States-General as soon as possible."

The District Court dismissed the application of the plaintiffs on the ground that, even if Article 58 of the Constitution permitted a treaty to become effective by virtue of an international agreement, this would not mean that the defendant, as a Netherlands national, was bound by the treaty. Against this judgment the plaintiffs lodged an appeal with the Court of Appeal at The Hague, which, however, upheld the judgment of the District Court. The plaintiffs subsequently brought the case before the Supreme Court sitting as a Court of Cassation.

Held: that the judgment of the Court of Appeal must be reversed and that the case must be sent back to the Court of Appeal at The Hague for further examination and decision.

The Court said: "From the debate in Parliament in 1922 which led to the adoption of Article 58 no other conclusion but the following can be drawn: (a) the difference between "treaties" and "other agreements" as mentioned in this Article merely means that there is a "treaty" if it has been concluded in "solemn treaty-form"; (b) only international agreements concluded in this way, and not the "other agreements" mentioned in Article 58, have to be approved by the States-General; (c) in this connection the subject-matter of the agreement in question is not relevant. Neither is it decisive that the draftsmen of the Article apparently had in mind that agreements on "important subjects" were as a rule concluded in solemn treaty-form, nor that the matter had been laid down in a different way in Article 59 of the Constitution as amended in 1887 and in the draft-article as originally submitted by the Government to the States-General for approval. It must be accepted that, seeing that "other agreements" differ from "treaties" only in point of form, in a formal way, such agreements may also bind Netherlands nationals without having been approved by the States-General if they contain provisions affecting their legal rights."

[Report: *N.J.*, 1956, No. 240.]

NOTE.—In 1953 the relevant provisions of the Netherlands Constitution were radically amended. The general principle laid down by these amendments is that all international agreements, with some exceptions, must be approved either expressly or impliedly by the States-General. Cases such as the present are not likely to arise out of agreements entered into under the amended Constitution. A comprehensive study of the amendments of 1953 has been published in English by van Panhuys in *American Journal of International Law*, 1953, pp. 537 *et seq.* See also Paul de Visscher in *Recueil des Cours de l'Académie de droit international*, 1952 (ii), pp. 542 *et seq.*

Human Rights and Freedoms—Rome Convention of 1950—Deportation for Rebellion under Municipal Law Enacted Prior to Convention.

DEPORTATION (GREECE) CASE.

Greece, Conseil d'État. 1954.

THE FACTS.—Article 5 of the International Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on November 4, 1950 (ratified and given legal force by Law No. 2329 of 1953), provides in part as follows:

"(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: [(*a*) to (f), various circumstances, not including one covering the present case]."

Article 15 of the Convention provides in part as follows:

"(1) In time of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation . . ."

This was an appeal against a sentence of deportation for the crime of rebellion, on the ground that it was a deprivation of liberty contrary to Article 5 of the Rome Convention.

Held: that the appeal must fail. The sentence of deportation did not contravene the Rome Convention.

The Court said: "Deportation by administrative act, which Decree-Law No. 687 of 1948 expressly describes as being justified in a case of rebellion, which is clearly a public emergency threatening the life of the nation, is a measure which complies with Article 15 and can therefore be taken within the framework of the Rome Convention. Moreover, having been instituted by a Law enacted prior to the coming into force of the said Convention, such a measure can continue to be applied as not being contrary to the provisions of the Convention. It is thus not relevant to enquire whether the deportation authorized by Decree Law No. 687 of 1948 is contrary to the provisions of Article 6 of the said Convention."

[Report: *Revue Hellénique de Droit International,* 7 (1954), p. 278.]

B—NATIONALITY

I.—In General. Proof of Nationality

Nationality—Proof of—Standard of Proof—Loss of Nationality by Failure to Reside in State of Nationality—The Law of the United States of America.

LEE WING HONG *ET AL. v.* DULLES.

United States, Court of Appeals, Seventh Circuit. July 30, 1954.

THE FACTS.—The plaintiffs were born in China and alleged that they were the natural-born sons of Lee You Fon, a citizen of the

United States. After Lee You Fon had resided in the United States for six years, he returned to China in 1930 and there married a national of that country. The plaintiffs asserted that they were the children of this marriage.

Between September 1949 and May 1951, Lee You Fon submitted to the United States Consul in Hong Kong a number of applications for passports for his sons. The attention of the Consul was called to the fact that one of the three sons would attain the age of sixteen in August 1951. In June 1951, the Consul disapproved the applications for passports on the ground that " the claims to identity were fraudulent ". The plaintiffs thereupon brought an action for a declaratory judgment to establish their American citizenship. The District Court held that the plaintiffs were American citizens and that the plaintiff Lee Wing Foo had not lost his citizenship by failing to enter the United States prior to his sixteenth birthday, as required by Section 201 (g) of the Nationality Act of 1940 (superseded by Section 301 of the Immigration and Nationality Act, 66 Stat. 235, 8 U.S.C. § 1401). His return to the United States was held to have been prevented by circumstances beyond his control. The defendant appealed on the ground that there had been no " denial " of a right or privilege of the plaintiffs as nationals of the United States, that the evidence was insufficient to support the finding that the plaintiffs were sons of Lee You Fon, and that there had been a failure to comply with statutory requirements concerning return to the United States.

On appeal,

Held: that the judgment appealed from must be affirmed. The fact that the denial of passports to the plaintiffs was grounded on doubt as to their identity rather than as to their American citizenship did not deprive the Court of jurisdiction to inquire into the validity of their claim. The evidence was sufficient to support the findings of the District Court that the plaintiffs were the sons of an American citizen. The failure of Lee Wing Foo to come to the United States before his sixteenth birthday, as required for the maintenance of his American citizenship, was caused by the refusal of the United States to issue a passport to him, and therefore did not deprive him of his citizenship.

After dealing with certain procedural matters, the Court said: " As we understand, it is conceded, at any rate not in dispute, that plaintiffs, if sons of Lee You Fon, are citizens and nationals of the United States. Defendant advances a contention, however, which we find difficult to comprehend, that there was no issue between the plaintiffs and the American Consul at Hong Kong as to their nationality but that the issue was solely one of identity, that is, whether they were, as asserted, sons of Lee You Fon.

" Defendant in his brief states: ' The defendant concedes that plaintiffs applied for passports and that a passport is a privilege to be accorded, in the discretion of the Secretary of State, to those owing allegiance, whether citizen or not, to the United States for the facilitation of travel.' And it is argued, ' Circumstances concerning the application for documentation of the plaintiffs at Hong Kong were such that the defendant could not be reasonably satisfied as to the identity of the persons making the claim to citizenship. That is not to say that the persons are not citizens. That is not to say that valid claims to citizenship in the names of such persons did not exist.' It is further asserted that a number of possibilities exist, such as that plaintiffs' claim to citizenship might have been fictitious and that they might have been impersonators or imposters. The brief further states, ' The defendant concedes performance of the first essential to jurisdiction, that is, a privilege claimed. The next question presented is whether there has been a denial of that privilege by the defendant as contemplated by the statute. . . . In this case, technically speaking, plaintiffs' applications for passports have been disapproved. The defendant contends that this is not the equivalent of a ' denial ' . . . .'

" The essence of all this argument is that the American Consul at Hong Kong did not deny a right or privilege claimed by plaintiffs, that is, to have a passport issued, without which they could not come to the United States, but that the Consul's action was only a refusal in his discretion to issue the same because of what he regarded as insufficient proof of identity. We think this is a supercilious argument and that it could be made in any case where a citizen, while abroad, was denied a passport so that he might return to this country. Nothing more would be required than that the Consul refuse to issue a passport on the issue of identity. The argument that a refusal to issue a passport because of insufficient proof of identity is not a denial within the meaning of the statute of the right or privilege claimed by plaintiffs is without support, either in reason or common sense. The predicament of the aggrieved party is no different than if he had been denied a passport on the express basis that he was not a national. And we think it immaterial that the American Consul acted in a discretionary capacity, assuming that such was the case. See *Perkins* v. *Elg*, 307 U.S. 325, 349, 59 S.Ct. 884, 83 L.Ed. 1320.[1] While defendant now contends that the sole issue is that of plaintiffs' identity, he conceded at the hearing, as already noted, that the issue was that of ' identity and nationality '. Thus, at that time he recognized that the two issues were to be considered together, while here he argues that they are separate and distinct, in effect that they bear no relation to each other.

" Sec. 93 [of the Nationality Act of 1940][2] also provides: ' If such person is outside the United States and shall have instituted such an action in court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country in which he is residing a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such certificate . . . .' These plaintiffs who were outside the United States, instituted an action in court and have under this provision been admitted and were witnesses in the instant case. It must be assumed that as a basis for the issuance of such certificate plaintiffs satisfied a diplomatic or consular officer that their claim of nationality was presented in good faith and that their showing of identity was sufficient.

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[1] See *Annual Digest*, 1938–1940, Case No. 116.]

[2] Now Section 360 of the Immigration and Nationality Act, 66 Stat 273, 8 U.S.C. § 1503.

" It is suggested by the defendant, apparently with little enthusiasm, that Sec. 903 affords a judicial remedy only for persons born within the United States who go abroad and attempt to return. The only case called to our attention which affords any support for the suggestion is that of a District Court in *Ly Shew* v. *Acheson*, 110 F.Supp. 50. What the court there stated appears to be dictum but in any event other courts have held to the contrary. In *Look Yun Lin* v. *Acheson*, D.C., 87 F.Supp. 463, at page 465, in response to the contention that the section was applicable only to persons who had formerly resided in the United States, the court stated, ' The statute [Sec. 903] on its face shows no such limitation, the remedy having expressly been made available to " any person " '. Nor do the decided cases involving this remedy support the defendant's [the Government's] position.' See also *Wong Wing Foo* v. *McGrath*, 9 Cir., 196 F.2d 120, 122, and *Acheson* v. *Fujiko Furusho*, 9 Cir., 212 F.2d 284, 288. Either with or without authority, however, we think it hardly open to question, under the plain, unambiguous language which Congress has employed, that the section is applicable to ' any person ' who is denied a right or privilege as a national ' by any Department or agency, or executive official thereof ' upon the ground that he is not a national. That is what the section expressly declares, without limiting or qualifying words. The language is all-inclusive and embraces nationals born abroad just as it does those born within the United States. If Congress had intended to limit its application it could readily have employed language to that effect. In view of the plain language employed, there is no room to engage in the nebulous process of ascertaining congressional intent. In our judgment plaintiffs' claim to nationality and defendant's refusal to issue passports essential to plaintiffs' rights to enter the United States engendered a controversy between the parties of which the court acquired jurisdiction both by the express terms of Sec. 903 and by the Declaratory Judgment Act, 28 U.S.C.A. Sec. 2201.

" On the other issue argued by defendant, that is, that the proof was not sufficient to support the findings upon which the conclusion of the District Court rests, that plaintiffs are the sons of Lee You Fon, admittedly an American citizen, we think no detailed discussion is necessary. The court heard the oral testimony of numerous witnesses and it was the function of the trial court to determine their credibility and the weight to be given their testimony. We have read the testimony and think that it supports the findings; certainly we cannot say that they are clearly erroneous, which we would be required to do under Fed. Rules Civ.Proc. Rule 52 (a), 28 U.S.C.A., as a prerequisite to our agreement with defendant's contention. In fact, defendant's attack upon the findings proceeds on a theory with which we have no sympathy. In his brief, defendant, after conceding that the proof establishes a ' prima facie ' case, in support of the findings states ' The defense, in opening argument, asked the lower court to adopt a standard of clear and convincing proof.' The essence of the argument here is that this court should refuse to accept the findings of the District Court because that court failed or refused to employ defendant's ' clear and convincing proof ' theory. Three cases are cited in support of this contention: *Lee Sim* v. *United States*, 2 Cir., 218 F. 432, 435; *Ex Parte Chin Him*, D.C., 227 F. 131, 132, 133, and *Ly Shew* v. *Acheson*, D.C., 110 F.Supp. 50, 58–59. All of these cases relative to the quantum of proof are directed at persons of the Mongolian race, and particularly to the Chinese. The Court of Appeals in *Mar Gong* v. *Brownell*, 9 Cir., 209 F.2d 448, at page 453, in repudiating this theory stated: ' We recognize all that may be said with respect to the necessity of the court guarding against imposition, but we also are of the view that no special quantum of proof should be exacted from any person claiming American citizenship merely because of his racial origin.' We agree with this statement but think it could well be expressed in more emphatic language. We would be much chagrined to think that the adjudication of an asserted right in the courts of this country was dependent in the slightest degree upon the national origin of the party involved. To think otherwise is to countenance discrimination in the courts, the one certain place where it should be unknown.

" What we have said relative to the findings of the District Court is applicable to all of the plaintiffs, although there is a further situation, both factually and legally, concerning the plaintiff, Lee Wing Foo, who was born August 5, 1935. The complaint was filed November 28, 1951, and at that time all of the plaintiffs, including Lee Wing Foo, were outside the United States. It appears to be defendant's contention that Lee Wing Foo, even though an American citizen at birth, became expatriated because of his failure to comply with Sec. 6, Title 8 U.S.C.A., Act of May 24, 1934, which required at least five years' residence in the United States previous to his eighteenth birthday, which means that he was required to become a resident of the United States prior to his thirteenth birthday.

However, the 1934 Act was superseded by the Nationality Act of 1940, 8 U.S.C.A. § 601 (g) and (h). The interpretation or meaning to be ascribed to paragraphs (g) and (h) is not entirely clear. Paragraph (g) provides: ' A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who, prior to the birth of such person, had had ten years' residence in the United States or one of its outlying possessions, at least five of which were after attaining the age of sixteen years, the other being an alien . . . .' Admittedly, Lee You Fon, father of the plaintiffs, had not had ten years' residence in the United States; however, the paragraph contains the following proviso: ' That, if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of sixteen years, or if he resides abroad for such a time that it becomes impossible for him to complete the five years' residence in the United States or its outlying possessions before reaching the age of twenty-one years, his American citizenship shall thereupon cease.'

" We think by this proviso it was intended to increase from thirteen years, as provided by the 1934 Act, to sixteen years, as the time when a person born outside of the United States must become a resident of this country or suffer a divestment of American nationality. This view is strengthened by paragraph (h), which provides: ' The foregoing provisions of subsection (g) concerning retention of citizenship shall apply to a child born abroad subsequent to May 24, 1934.' Lee Wing Foo, as already noted, was born subsequent to May 24, 1934, to wit, August 5, 1935. The language of paragraph (h) indicates that it was intended to supersede the 1934 Act because it is made applicable to a child born abroad subsequent to May 24, 1934, which was the exact date when the 1934 Act became effective. We know of no case where the precise question has been considered but our study of the various provisions of the statute leads us to the conclusion that plaintiff, Lee Wing Foo, is entitled, as held by the District Court, to the benefit of the 1940 Act, which required residence in this country not later than his sixteenth birthday.

" Even so, however, defendant advances another obstacle to an affirmance of the judgment as it relates to Lee Wing Foo, that is, that he did not become a resident of this country prior to his sixteenth birthday. We have heretofore set forth the finding of the District Court and its conclusion on this phase of the case and need not repeat. The evidentiary showing supports the finding, and the weight of authority, admittedly not too impressive, sustains the conclusion. *Uyeno* v. *Acheson*, D.C., 96 F.Supp. 510, 520; *DiGirolamo* v. *Acheson*, D.C., 101 F.Supp. 380, 382, and *Hong* v. *Acheson*, D.C., 110 F.Supp. 60, 62. We agree with the reasoning contained in the last named case.

"We have not overlooked the importance which the defendant attaches to the testimony of an expert witness to the effect that blood tests showed that Lee Wing Foo was not the son of Lee You Fon. We think it would be futile to relate this testimony in detail, including the discrepancies and contradictions asserted by the plaintiffs to exist. However valuable or important such testimony may be, we know of no rule which makes it conclusive. The District Court, evidently in view of the entire factual situation, did not credit the testimony of the expert. We think this was clearly within the province of the trial court and find no occasion to disturb his action in this respect."

[Report: 214 F.2d 753.]

NOTE.—The burden of proof in an action for a declaratory judgment of United States citizenship was discussed in *Chow Sing* v. *Brownell*, 217 F.2d 140 (9th Cir. 1954); *Ly Shew* v. *Acheson*, 219 F.2d 413 (9th Cir. 1954), vacating judgment in 110 F.Supp. 50 (N.D.Calif. 1953); *Wong Fon Haw* v. *Dulles*, 125 F.Supp. 658 (S.D.N.Y. 1954); *Lou Goon Hap* v. *Dulles*, 119 F.Supp. 808 (D.D.C. 1954). Cf. *Mar Gong* v. *Brownell*, 209 F.2d 448 (9th Cir. 1954), reversing 109 F.Supp. 821 (S.D.Calif. 1952).

In an action for a declaratory judgment of United States citizenship the lower Court's findings will not be reversed on appeal unless they are "clearly erroneous": *Elias* v. *Dulles*, 211 F.2d 520 (1st Cir. 1954); *Law Don Shew* v. *Dulles*, 217 F.2d 146 (9th Cir. 1954); *Brownell* v. *Lee Mon Hong*, 217 F.2d 143 (9th Cir. 1954), affirming 110 F.Supp. 682 (N.D.Calif. 1953).

The requirement that administrative remedies be exhausted prior to the commencement of an action for a declaratory judgment of United States citizenship was dealt with in *Ling Share Yee et Al.* v. *Acheson*, 214 F.2d 4 (3d Cir. 1954), *certiorari* denied, 348 U.S. 873, 99 L.Ed. 687, 75 Sup.Ct. 109 (1954); *Samaniego* v. *Brownell*, 212 F.2d 891 (5th Cir. 1954); *Linzalone* v. *Dulles*, 120 F.Supp. 107 (S.D.N.Y. 1954).

The issue of whether the plaintiff must be "within the United States" in order to bring an action for a declaratory judgment of United States citizenship was involved in *Tom Mung Ngow* v. *Dulles*, 122 F.Supp. 709 (D.D.C. 1954). Cf. *Lum Chan Fee* v. *Dulles*, 121 F.Supp. 406 (D.Hawaii 1954); *Correia* v. *Dulles*, 129 F.Supp. 533 (D.R.I. 1954). See also *Dulles* v. *Lee Gnan Lung*, 212 F.2d 73 (9th Cir. 1954) (right or privilege as a United States national must have been denied on the ground that plaintiff is not a national); *Wong Bick Ling et Al.* v. *Dulles*, 119 F.Supp. 513 (D.D.C. 1954) (mandamus will not lie to order the Secretary of State to issue a certificate of identity so that plaintiff may come to the United States to press his claim of citizenship); *Beltran* v. *Brownell*, 121 F. Supp. 835 (S.D.Calif. 1954) (action for a declaratory judgment of United States citizenship must be brought under terms of a statute waiving the immunity of the United States from suit).

Nationality—Proof of—Foreign Law.

See p. 192 (*Riegel* v. *Council of the Canton of Schaffhausen*).

II.—Acquisition of Nationality. Nationality as affected by Changes of Sovereignty

Nationality—As Affected by Territorial Changes—Annexation of Austria by Germany—Subsequent Severance of Austria from Germany—Effect of Severance on Nationality of Former Austrians Domiciled in Germany.

NATIONALITY (SECESSION OF AUSTRIA) CASE.

German Federal Republic, Supreme Administrative Court.
October 30, 1954.

THE FACTS.—The plaintiff was an Austrian by birth. On March 13, 1938, the German Reich annexed Austria, and a German Law of the same date and a subsequent German Ordinance of July 3, 1938, provided for the acquisition of German nationality by Austrian citizens. The plaintiff accordingly acquired German nationality in 1938. Austria regained her independence in April 1945, and on July 10 of that year enacted a Law which provided that former Austrians who had acquired German nationality by virtue of the German enactments referred to above were henceforth to be Austrian citizens. At that time the plaintiff was domiciled in Germany, and she did not thereafter return to Austria. In 1951 she applied to the competent German authorities for a certificate that she was a German citizen. The certificate was refused on the ground that, by virtue of a recognized rule of international law, the secession of Austria from Germany resulted in the automatic loss by the plaintiff of her German nationality. The plaintiff thereupon brought an action for recognition of her German nationality. She contended that there was no rule of international law which provided for the automatic loss of a person's nationality as a result of territorial changes affecting the territory in which that person lived, and that, in any event, even if there was such a rule, it could not apply to persons, like herself, who were not domiciled in the seceding State on the date of secession, and that accordingly she was entitled to German nationality.

Held: (i) that the practice of States concerning the effect of territorial changes on the nationality of the inhabitants of territories affected thereby varied, and that the determination of the nationality of such persons usually formed the subject-matter of treaties; (ii) that, accordingly, there was no rule of international law which provided for the automatic loss of nationality as a result of territorial changes, and more especially of secession; and (iii) that the question of the plaintiff's nationality had to be determined by German law, and that as by German law the plaintiff had not lost her German nationality she was entitled to the certificate for which she asked.

The Court said: " Article 25 of the Constitution provides that the general rules of international law are an integral part of (German) federal law. It follows that the plaintiff would have lost her German nationality if such loss could be inferred from a general rule of international law. . . . However, there is no such general rule of international law. The States members of the international community have not adopted a uniform practice when dealing with questions of nationality in connection with territorial changes."

[The Court then proceeded to review the practice of different States after the First and Second World Wars and the relevant provisions of the Treaty of Versailles and continued:] " On the contrary, it is a general rule of international law that a State is alone competent to determine how its nationality shall be acquired and lost. Questions concerning changes of nationality require detailed provision in the event of territorial changes, because the municipal legal systems in the matter of the law of nationality have adopted different principles which they apply, in part separately, and in part in a mixed form. Thus, they regard descent (*jus sanguinis*) as partly relevant, and they also have regard, in part, to territorial criteria (birth or domicile within the country, *i.e.*, *jus soli*). . . . . Having regard to the fact that in the majority of cases questions concerning a change of nationality have been expressly provided for in peace treaties, although not always in a uniform manner, there is no general rule of international law governing the loss of nationality of the ceding State which could have become part of federal law in accordance with Article 25 of the Constitution. Accordingly, the plaintiff has not lost her German nationality by virtue of any general rule of international law. . . .

" The questions concerning nationality which have arisen as a result of the territorial changes after the Second World War have not yet been dealt with by legislation. In particular, the Occupying Powers have not yet made any legislative provision for the case of Austrians who in 1945 remained in the territory of what is now the [German] Federal Republic. . . . The Occupying Powers have not repealed the German Law of Nationality of 1913. We come to the conclusion that, just as there is no generally recognized rule of international law governing changes in nationality in the event of territorial changes, so there is equally no rule of international law from which it could be inferred that, in the event of part of a State being severed from the whole, some of the persons remaining in the old State automatically lose the nationality of the latter. It cannot be denied that those persons actually domiciled in the territory of the Republic of Austria acquired Austrian nationality, either by virtue of the re-establishment of that State or by virtue of the Law of July 10, 1945. The Court is not concerned with the question whether persons so domiciled lost their German nationality as a result of the re-establishment of the Republic of Austria and their acquisition of Austrian nationality, but it must not be thought that this Court would necessarily answer that question in the negative.

Well-known teachers of international law take the view that an emancipation of this kind results in an automatic change of nationality, *i.e.*, that there is simultaneously acquisition of the new and loss of the old nationality. However, even in the view of those teachers, the loss of the old nationality is automatic only so far as concerns persons who are within the sphere of power of the new State, the loss of the nationality of the old State taking place at the moment when the new State is established or re-established. Accordingly, the Court cannot share the view that Austrian citizens by birth who were in Germany in 1945 and who have uninterruptedly remained here—of whom the plaintiff is one—lost their German nationality as a result of the severance of the Austrian State. . . . A duty of the Federal Republic, under international law, to release from their German nationality Austrians by birth who have remained in Germany would require the enactment of a [special] law."

[Report: JZ, 10 (1955), p. 80.]

Nationality—Acquisition of—As a Result of Transfer of Sovereignty —Transfer of Eupen and Malmédy to Belgium in 1920—Nationality of Residents of Eupen and Malmédy—Residence Requirements.

SCHUMACHER *v.* OFFICE DES SÉQUESTRES.

Belgium, Court of Cassation. January 16, 1954.

THE FACTS.—This was an action to recover property placed under sequestration as enemy property, on the ground that its owner, the present appellant, was a Belgian national and not an enemy alien. The appellant, a German national by origin, was born at Raeren, Eupen, and was resident there both on August 1, 1914, and on September 20, 1920, when sovereignty over Eupen was finally transferred to Belgium. According to Article 36 of the Treaty of Versailles, German nationals established in Eupen from August 1, 1914, to September 20, 1920, acquired Belgian nationality. The Court of Appeal of Liége, by a judgment dated January 28, 1953, found that the appellant did not satisfy this residence requirement because, although he had been established in Eupen both on August 1, 1914, and on September 20, 1920, he had not shown that he was established there for the whole intervening period, and held, accordingly, that he had remained a German national. It was now contended on behalf of the appellant that Article 36 of the Treaty of Versailles required the retention of a home in Eupen over the whole of the period from 1914 to 1920, but did not require uninterrupted physical presence, and that the Court below had not made clear whether it considered as a question of fact that the appellant had abandoned his home in Eupen during the period in question, or whether it decided as a question of law that even a temporary absence deprived him of the right to Belgian nationality.

Held: that the appeal must be dismissed.

The Court said: "The fact that a German national established in the cantons concerned on August 1, 1914, left this territory for a temporary stay elsewhere, with the intention of returning, does not suffice to deprive him of the benefits conferred by Article 36 of the Treaty of Versailles. However, a person invoking that Article must have had his home constantly and permanently in the cantons concerned between August 1, 1914 and September 20, 1920. Argument in the Court below bore on the question whether the appellant had had a permanent home in the cantons during the period in question; it was found—and the finding of the fact is final—that he did not."

[Report: *Pasicrisie belge*, 1954, I, p. 409.]

Nationality—Not Affected by Grant to Another State of Full Powers of Administration, Legislation and Jurisdiction—Nationality of Natives of Ryukyu Islands.

See p. 82 (*United States* v. *Ushi Shiroma*).

V.—Naturalization

Naturalization—Disqualification for Refusal to Serve in Armed Forces—Effect of Request for Exemption under Treaty Regarding Military Service—The Law of the United States of America.

Petition of Mauderli.

United States, District Court, Northern District, Florida. June 28, 1954.

The Facts.—The petitioner, a national of Switzerland, entered the United States for permanent residence in 1942. He registered for military service under the Selective Service and Training Act of 1940, and was shortly thereafter directed to report for induction into the armed forces. He claimed and was granted exemption from military service under Article II of the Treaty of Friendship, Commerce, and Extradition between the United States and Switzerland, signed at Berne on November 25, 1850 (11 United States Statutes at Large 587, *Treaty Series* No. 353). Upon consulting the Swiss Legation in Washington regarding the action which he had taken, he was advised by the Legation that he should withdraw the request for exemption which he had filed (DSS Form 301) and should file a revised form from which there should be eliminated the provision that a claim for exemption disqualified him for American citizenship. Although the petitioner was not allowed to withdraw the original form, he filed an amended form in accordance with the instructions which he had received from the Swiss Legation. As the result of these acts he was granted exemption from military service throughout the Second World War and thereafter.

The petitioner brought this action for naturalization under the Immigration and Nationality Act, 66 Stat. 163, 8 U.S.C. §§ 1101 *et seq.* Naturalization was resisted by the Immigration and Naturalization Service on the basis of Section 315 of that Act (quoted in the opinion of the Court). The petitioner maintained that his request for exemption had been filed under a misapprehension and that he was accordingly, under *Moser* v. *United States*,[1] not bound thereby.

Held: that the petition for naturalization must be denied. *Moser* v. *United States* did not govern the present case inasmuch as the petitioner had filed his request for exemption before consulting the Swiss Legation. The *Moser* Case had, in any event, been superseded by Section 315 of the Immigration and Nationality Act of 1952, which denies citizenship to aliens who have applied for exemption from military service.

The Court said: " . . . The Selective Training and Service Act of 1940 contained a proviso which has been, in substance, incorporated in all subsequent amendments to this Act and which is now to be found in the Universal Military Training and Service Act of June 24, 1948, 62 Stat. 604, 50 U.S.C.A.Appendix, § 454, to the effect that any male alien (with exceptions not important here) residing in the United States, who claims exemption from military service because he is a citizen or subject of a neutral country shall be relieved from such service, but ' shall thereafter be debarred from becoming a citizen of the United States.'

" The prohibition against becoming a citizen of the United States upon such a claim was found only in the Selective Training and Service Act of 1940 and subsequent Acts of a similar nature, until Congress passed the Immigration and Nationality Act of 1952. In other words, all steps taken by petitioner and by the Swiss Legation to secure petitioner's exemption from military service was in conformity with what the Legation had done for other nationals which was subsequently held by the Supreme Court of the United States, in *Moser* v. *U. S.*, not to debar the alien from citizenship despite the prohibition contained in the Selective Training and Service Act of 1940, as amended.

" There is some difference in the case before the court here and the *Moser* case. Moser never filed Form DSS 301 until the Swiss Legation had cleared his right to do so with the State Department. In this case petitioner went ahead and filed Form DSS 301 without consulting the Swiss Legation and it was only after he was advised of his error that he attempted to withdraw the original filing and substitute therefor a revised DSS 301, which he was denied the right to do. This distinction, in itself, may be enough to make *Moser* v. *U. S.* not controlling here. In the opinion of this court, however, the *Moser* decision has now been superseded by Sec. 315 of the Immigration and Nationality Act of 1952, 8 U.S.C.A. § 1426. This Section specifically provides:

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[1] [See *Annual Digest*, 1949, Case No. 78.]

'(a) Notwithstanding the provisions of section 405(b), any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

'(b) The records of the Selective Service System or of the National Military Establishment shall be conclusive as to whether an alien was relieved or discharged from such liability for training or service because he was an alien.'

" Petitioner cites and relies upon *Petition of Berini*, D.C., 112 F.Supp. 837, as authority to the effect that the above-quoted section is not applicable here. I disagree with the holding in the *Berini* Case. In my opinion the section is applicable and controlling. The section is also definitely retroactive and therefore would encompass any prohibited action of petitioner in seeking exemption from military service prior to the effective date of the Immigration and Nationality Act. The intent of Congress by the adoption of this section and the language of Sec. 315 are so clear that there is no need to labor the point.

" The court finds and holds that notwithstanding the fact this petitioner committed all the acts that debar him from naturalization prior to the passage of the Immigration and Nationality Act of 1952, this Act takes from petitioner the sacred right of American citizenship."

[Report: 122 F. Supp. 241.]

NOTE.—Petitions for naturalization were also opposed on the ground that the alien had been exempted from military service in *Petition of Caputo*, 118 F.Supp. 870 (E.D.N.Y. 1954); *Petition* of *Kutay*, 121 F. Supp. 537 (S.D.Calif. 1954); *Petition of Zumsteg*, 122 F.Supp. 670 (S.D.N.Y. 1954); and *Petition of Coronado*, 132 F.Supp. 419 (E.D.N.Y. 1954), affirmed, *per curiam*, 224 F.2d 556 (2d Cir. 1955).

In *Petition of Karadzas*, 124 F. Supp. 25 (S.D.N.Y. 1954) and *Petition of Witt*, 118 F.Supp. (E.D.N.Y. 1954) naturalization was sought under a statute permitting service on American-owned vessels to be substituted for continuous residence in the United States.

The requirement that the petitioner have been lawfully admitted to the United States was an issue in *Petition of Matesich*, 124 F.Supp. 844 (S.D.N.Y. 1954); *Petition of Barandarian*, 123 F.Supp. 827 (S.D.N.Y. 1954); and *Re Jocson*, 117 F.Supp. 528 (D.Hawaii 1954).

As regards the requirement that the petitioner must prove his " good moral character ", see *Petition of McNab*, 121 F. Supp. 938 (E.D.La. 1954); *Brukiewicz* v. *Savoretti*, 211 F.2d 541 (5th Cir. 1954); *United States* v. *Docherty*, 212 F.2d 40 (5th Cir. 1954). However, conviction for a crime was not conclusive of bad moral character: see *Petition of Knight*, 122 F.Supp. 322 (S.D.N.Y. 1954); and *United States* v. *Cunha*, 209 F.2d 326 (1st Cir. 1954).

Naturalization was granted in *Petition of Pellegrini*, 126 F.Supp. 742 (S.D.N.Y. 1954) (husband of United States citizen) and in *Petition of Robertson*, 127 F.Supp. 39 (W.D.Mo. 1954) (adopted son of United States citizen).

In *Petition of Strati*, 131 F.Supp. 786 (E.D.Pa. 1954), affirmed, *per curiam*, 223 F.2d 470 (3d Cir. 1955), naturalization was granted on the basis of United States military service in the First World War despite the fact that the petitioner's United States citizenship had previously been cancelled.

A petition for naturalization will not be heard while deportation proceedings are pending against the petitioner: see *Application of Chin King*, 124 F.Supp. 911 (S.D.N.Y. 1954).

Nationality—Naturalization—Compulsory Naturalization—On Reception into Mount Athos Monastery.

See p. 195 (*Mount Athos* (*Nationality*) *Case*).

Nationality—Acquisition of, by Naturalization—Non-Observance of Formal Requirements—Informal Statement by Official of German Democratic Republic that Applicant is " Recognized as a German National "—Whether Naturalization Valid in Federal Republic of Germany.

See p. 43 (*Re Lachinger*).

VI.—Expatriation. Loss of Nationality

Nationality—Loss of—Revocation of Certificate of Naturalization—Revocation for Alleged Concealment of Arrests Prior to Naturalization Proceedings—Burden of Proof—The Law of the United States of America.

CUFARI *v.* UNITED STATES.

United States, District Court, District of Massachusetts. May 6, 1954.

Court of Appeals, First Circuit. December 6, 1954.

THE FACTS.—Cufari, a native of Italy who had entered the United States in 1914, filed a petition for naturalization in 1927. Under the procedure then followed, he appeared before a Naturalization Examiner for preliminary examination. At that time, he affixed his signature to a " docket slip " on which the Examiner had noted certain information about him, including an entry " no arrests ". He subsequently appeared at a naturalization session of a Court of the Commonwealth of Massachusetts and was admitted to United States citizenship and issued with a Certificate of Naturalization.

In 1953, the United States filed a complaint under Sec. 340 (a) of the Immigration and Nationality Act, 66 Stat. 260, 8 U.S.C. § 1451(a), asking for revocation of the order of the Court admitting Cufari to citizenship and cancellation of his Certificate of Naturalization on the ground that they had been procured by concealment of material facts and wilful misrepresentation. It was alleged, and admitted by Cufari at the trial, that he had in fact been arrested nine times between 1923 and 1927. Cufari maintained, however, that he had no recollection of being asked about arrests either at the preliminary examination or at the hearing in court. Both the Naturalization Examiner and the Judge before whom Cufari had appeared were by now dead, but evidence was introduced on behalf of the United States that questions about arrests were normally asked at naturalization proceedings in 1927, although not required by statute or regulations.

Held (by the District Court): that the petition for revocation of the naturalization order and of the certificate of naturalization must be granted. The evidence of misrepresentation of material facts was clear and convincing. [Report: 120 F. Supp. 941.]

On appeal,

Held (by the Court of Appeals): that the judgment of the Court below must be reversed and judgment entered for the defendant. While weight would normally be given to the findings of the District Court, the Court of Appeals was not constrained to give as much weight to such findings in actions for revocation of naturalization as in other civil cases. The evidence produced by the Government was not sufficiently strong to warrant the denaturalization of one who had enjoyed the status of a citizen for twenty-six years.

The Court said: " There can be no doubt that the District Court measured the persuasive force of the Government's evidence by the exacting standard established in *Schneiderman* v. *United States*, 1943, 320 U.S. 118, 125, 63 S.Ct. 1333, 87 L.Ed. 1796, and applied in *Baumgartner* v. *United States*, 1944, 322 U.S. 665, 64 S.Ct. 1240, 88 L.Ed. 1525 and *Knauer* v. *United States*, 1946, 328 U.S. 654, 66 S.Ct. 1304, 90 L.Ed. 1500.[1] Nor do we think there can be any doubt that the exacting standard applies in cases such as this even though it was established and has only been applied by the Supreme Court in cases involving the sincerity of an applicant's oath of allegiance—a subjective matter of belief where necessarily ' proof is treacherous and objective judgment, even by the most disciplined minds, precarious.' *Baumgartner* v. *United States*, *supra*, 322 U.S. 675, 64 S.Ct. 1246. In the *Brenci* case cited at the outset of this opinion we applied the strict standard of proof in a situation like the present where ' attachment ' to Constitutional principles was not involved, and we apply it here, for the reason that the Supreme Court in the

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[[1] See *Annual Digest*, 1946, Case No. 51.]

Schneiderman case, supra [320 U.S. 118, 63 S.Ct. 1336], adopted a rule of strict proof long applicable in land grant cases on the ground that a certificate of naturalization as a grant of political privileges was ' closely analogous to a public grant of land ', and ' rights once conferred should not be lightly revoked '.

" Thus we come face to face with the question of our appellate function in the premises.

" The Supreme Court in the Baumgartner case, supra, clearly indicated that in denaturalization cases we have somewhat broader powers than are accorded to us in other civil cases to review findings falling into the category of findings of fact. The Court did not suggest, however, that we should wholly disregard findings of fact made below and ourselves try these cases *de novo* and make findings of fact ourselves. On the contrary, the Court characterized the rule that concurrent findings of two lower courts ' are persuasive proof in support of their judgments ' as ' a rule of wisdom in judicial administration ' to which it said it intended to pay more than lip service. Nor did the Court in Baumgartner's case lay down a rule of appellate conduct in denaturalization cases comparable to the ' clearly erroneous ' rule embodied in Rule 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A. That is to say it is not suggested that we might reverse only when we were of the opinion that the district court was ' clearly erroneous ' in its conclusion that the Government's evidence was so clear, unequivocal, and convincing that the issue was not left in doubt. The Court left the matter of our appellate function pretty much at large when on page 671 of 322 U.S., on page 1244 of 64 S.Ct. it summarized its discussion with the statement: ' Suffice it to say that emphasis on the importance of " clear, unequivocal, and convincing " proof, see *Schneiderman* v. *United States*, *supra*, 320 U.S. at page 125, 63 S.Ct. at page 1336, 87 L.Ed. 1796, on which to rest the cancellation of a certificate of naturalization would be lost if the ascertainment by the lower courts whether that exacting standard of proof had been satisfied on the whole record were to be deemed a " fact " of the same order as all other " facts ", not open to review here.'

" We shall not attempt what the Supreme Court carefully avoided and undertake ourselves to express in a verbal formula what we consider our function to be in these cases. It will be enough to say that while we accord weight to a district court's findings in deference to the wisdom of the general rule of judicial administration based on the opportunity afforded that court to observe witnesses in the flesh and judge their credibility, we do not weight those findings as heavily as we would in other cases of a civil nature.

" Approaching the case on this basis we disagree with the conclusion reached below. In doing so we recognize that minds can well differ in evaluating the probative force of items of evidence. What may seem clear and unequivocal to one may not seem so to another, and where one may have grave doubts another may have none. The resolution of cases like this lies in the subjective where opinions can well and very often do differ radically. The district courts in the first instance must call the turn as they see it, and we on appeal must do very much the same thing.

" The controlling question here is not whether Cufari's arrests were legal, cf. *United States* v. *Kessler*, 3 Cir., 1954, 213 F.2d 53, or the seriousness of the charges laid against him, or the validity of those charges. It is whether Cufari was asked, either at his preliminary examination or at the hearing in the Superior Court of the Commonwealth of Massachusetts, whether he had ever been arrested and had answered in the negative.

" No doubt Cufari's docket slip coupled with the evidence of the practice and custom of Examiners generally and of Examiners Davis and Mahoney in particular is enough to establish by the balance of the probabilities that Cufari was asked if he had ever been arrested and answered that he had not. But in 1927, as we have already pointed out, inquiry about arrests in the course of the naturalization process was not required either by statute or departmental regulation. And the case against Cufari is weaker than the case against *Brenci* which we considered five years ago in that Brenci's slip contains much more detailed information, including information as to his marital status, belief with respect to polygamy etc., than Cufari's on which nothing appears except the brief and somewhat unclear and fragmentary notes reported in full earlier in this opinion. Indeed it is not clear beyond the possibility of question that the notation ' no arrests ' under the heading Result of Examination does not apply to his father, Filippo, instead of to the applicant Salvatore. Moreover, Brenci's slip was sworn to and Cufari's was not, and Brenci's slip disclosed arrests for minor offenses but not for two serious ones which we thought indicated rather clearly that he had been asked about his arrests and had withheld full disclosure. Furthermore Brenci admitted in a statement to an officer of the Naturalization Service that he had been asked about arrests and had concealed his arrests for serious crimes for the very purpose of obtaining naturalization, whereas Cufari said that he could not remember whether he was ever asked about arrests or not, which is not particularly surprising in view of the lapse of time since 1927.

" Perhaps not much more can be said, or needs to be said, than that considering the record as a whole we find ourselves unable to agree with the District Court's conclusion that the Government has established its case by clear, unequivocal, and convincing evidence which does not leave the issue in doubt. It seems to us that the Government must produce stronger and more conclusive evidence than it has produced against Cufari to warrant denaturalizing one who has enjoyed the status of citizen for twenty-six years."

[Report: 217 F.2d 404.

NOTE.—United States citizenship was also revoked for fraud in the naturalization proceedings in *United States* v. *Gelbert*, 121 F.Supp. 414 (N.D. Ill. 1954) (concealment of arrests); *United States* v. *Tuteur*, 215 F.2d 415 (7th Cir. 1954); *United States* v. *Pistilli*, 119 F. Supp. 237 (E.D.N.Y. 1954); *United States* v. *Orrino*, 120 F.Supp. 569 (E.D.N.Y. 1954) (false statements about marital status); *Charnowola* v. *United States*, 211 F.2d 118 (6th Cir. 1954), affirming 109 F.Supp. 810 (E.D. Mich. 1953), *certiorari* denied, 348 U.S. 817, 99 L.Ed. 644, 75 Sup.Ct. 28 (1954); *United States* v. *Chruszczak*, 127 F.Supp. 743 (N.C. Ohio 1954) (concealment of Communist Party membership).

In *United States* v. *Tarantino*, 122 F.Supp. 929 (E.D.N.Y. 1954), it was held that a statute providing for revocation of citizenship acquired by United States military service if the individual was subsequently dishonorably discharged, was not mandatory.

Procedural aspects of the revocation of United States citizenship were dealt with in *United States* v. *Zucca*, 125 F.Supp. 551 (S.D.N.Y. 1954), affirmed *per curiam*, 221 F.2d 805 (2d Cir. 1955), affirmed 351 U.S. 91, 100 L.Ed. 539, 76 Sup.Ct. 671 (1956) (requirement that the Attorney-General file an affidavit of good cause for revocation); *United States* v. *Candela*, 131 F.Supp. 249 (S.D.N.Y. 1954) (same issue as *Zucca* case, *supra*,); *United States* v. *Harajovic*, 125 F.Supp. 659 (D.Mass. 1954) (the Nationality Act of 1940, 54 Stat. 1137, did not apply to revocation proceedings begun after the effective date of the Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U.S.C. § 1101 ff.).

Nationality—Loss of—Expatriation—Effect of Military Service in Foreign Army and Voting in Foreign Election—The Law of the United States of America—Power of the Congress to Take Away Nationality.

TERADA *v.* DULLES.

United States, District Court, District of Hawaii. May 19, 1954.

THE FACTS.—The plaintiff Terada was born in Hawaii of parents who were subjects of Japan and was thus a dual national of the United States and Japan. Upon the completion of high school, he went to Japan to study. The imminence of war caused him to book passage to Hawaii early in December 1941, but the ship on which he had sailed turned back to Japan at the outbreak of war. Despite a claim to exemption on physical grounds, the plaintiff was conscripted into the Japanese Army in 1944 and was discharged in September 1945. He voted in the first Japanese election after the Second World War, which was held in April 1946, but in no subsequent elections.

The plaintiff sought a declaratory judgment that he was a citizen of the United States. The defendant asserted that Terada had lost his United States citizenship, pursuant to Section 401 of the Nationality Act of 1940, 54 Stat. 1168, as amended (superseded by Section 349 of the Immigration and Nationality Act, 66 Stat. 267, 8 U.S.C. § 1481), by serving in the Japanese Army and by voting in a Japanese election.

Held: that the plaintiff was a citizen of the United States. The service of the plaintiff in the Japanese Army was involuntary and therefore did not effect expatriation. The provision of the Nationality Act depriving persons of their citizenship for voting in a foreign election is unconstitutional, and therefore did not operate to take away the United States citizenship which the plaintiff acquired by birth.

The Court said: " The facts are typical of many recent cases in this District. Involved is a dual citizenship status, and an administrative denial of a right or privilege based on an assertion of loss of American nationality because of service in the Japanese Army or voting in a Japanese political election.

" Upon the surface, the issue appears to be whether or not plaintiff's acts of military service in the Japanese Army, and of voting in Japan in an election authorized by General MacArthur as head of the Occupation Forces then in control of Japan were or were not his free and voluntary acts. If either act was voluntary, it is contended by the defendant upon the strength of respected old cases, as well as new authorities, that the plaintiff lost, despite his lack of actual knowledge, intent or consent, his American citizenship. *Savorgnan* v. *United States*, 1950, 338 U.S. 491, 70 S.Ct. 292, 94 L.Ed. 287[1]; *Perkins* v. *Elg*, 1939, 307 U.S. 325, 59 S.Ct. 884, 83 L.Ed. 1320[2]; *Perri* v. *Dulles*, 3 Cir., 1953, 206 F.2d 586; *Lehmann* v. *Acheson*, 3 Cir., 1953, 206 F.2d 592[3]; *Takehara* v. *Dulles*, 9 Cir., 1953, 205 F.2d 560; *Acheson* v. *Mariko Kuniyuki*, 9 Cir., 1951, 189 F.2d 741; *Hichino Uyeno* v. *Acheson*, D.C.Wash. 1951, 96 F.Supp. 510. Cf. *Tomoya Kawakita* v. *United States*, 1952, 343 U.S. 717, 72 S.Ct. 950, 96 L.Ed. 1249.[4]

" With due respect to the identity, age, and volume of authorities relied upon, I do not believe they correctly state the law. The error should not be further perpetuated. Below the surface, the real issue constantly overlooked is whether Congress has the unilateral power to take away citizenship granted native-born by the Constitution itself. If it has not, may it find a voluntary renunciation by reading into the doing of such colorless acts as it may specify, today or tomorrow, a really non-existent intent or consent to forfeit a birthright ? In brief, absent the factor of consent of both the sovereign and the individual, is not native citizenship indestructible ? If so, should not Congress confine itself to punishing offending citizens for treason and lesser crimes ?

" Complicating this fundamental domestic question is the further question of the legal consequences flowing from dual citizenship. Should one, assuming Congress has the power, be compelled by law to sacrifice his American heritage for doing in the other country to which since birth he also has been legally related, that which by its laws he had a right, privilege, or duty to do? . . .

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[1] See *Annual Digest*, 1949, Case No. 59.]

[2] *Ibid.*, 1938–1940, Case No. 116.]

[3] See *International Law Reports*, 1953, p. 255.]

[4] *Ibid.*, 1951, p. 265.]

" Conclusions of Law

" A. The plaintiff's service in the Japanese Army, pursuant to draft as a national of that country while resident therein and directly subject to its immediate jurisdiction, was involuntary service, not effecting expatriation.

" B. Although our country recognizes dual citizenship; although Japan in April 1946 had been defeated in war and was occupied by the victors who established a military government which authorized the election; though being resident in Japan, and as a subject entitled as well as expected to vote—still, as the law is now written and interpreted, the plaintiff would lose his American nationality by voting in Japan in April 1946, except that as applied to the facts in this situation, 8 U.S.C. § 801 (e)[1] is unconstitutional in that Congress is devoid of power to take away native citizenship.

" Opinion

" Finding as a fact that the plaintiff was conscripted under the military law of Japan into its Army, applicable law dictates that such involuntary conduct did not effect a forfeiture of his American citizenship under 8 U.S.C.A. § 801 (c). *Mandoli* v. *Acheson*, 1952, 344 U.S. 133, 73 S.Ct. 135, 97 L.Ed. 146[2]; *Perri* v. *Dulles*, *supra*; *Lehmann* v. *Acheson*, *supra*.

" Because of this finding of fact, the question of the constitutionality of the cited statute does not come into focus.

" To see it clearly, and to come to grips with it, we pass to the voting issue.

" At the threshold, it is pertinent to inquire: What if the plaintiff did vote? He was a subject of Japan. He was in Japan. He was eligible to vote. He was expected to vote. General MacArthur expressed publicly the wish that all eligible voters do so. Owing allegiance to both Japan and the United States, how under these circumstances can the law rationally say that this act of voting denotes either an intentional change of allegiance or a preference between his two loves? In a valid dual citizenship situation, none of the parties should be emotionally disturbed by professions of loyalty to the other object of the individual's allegiance. To read out a citizen for reasons of jealousy effects cruel and abusive civil punishment.

" Next, we should inquire if the election was political and in a foreign country. My personal doubts that in 1946 occupied Japan was a full and independent sovereignty within the meaning of the statute are not decisive, since the Court of Appeals for the Ninth Circuit has decided otherwise, and its opinion controls. *Acheson* v. *Mariko Kuniyuki, supra*; *Hichino Uyeno* v. *Acheson, supra.*

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[1] Now 8 U.S.C.A. § 148 1(a) [Immigration and Nationality Act of 1952].

[[2] See *International Law Reports*, 1951, p. 251.]

" We now pass to a consideration of whether or not the plaintiff's act of voting was his free and voluntary act.

" I have found that factually the plaintiff voted voluntarily. I base this conclusion upon these considerations: First, I am not satisfied that the factors cited by the plaintiff actually resulted in a legal compulsion to vote in his individual case. The plaintiff offered several good reasons of a retrospective nature for what was obviously the real reason, to wit: he was eligible, it was expected, and he did his duty like a good citizen of new Japan. The MacArthur directive authorizing the election and safeguarding its free and voluntary nature by strict enforcement of law guaranteeing a secret ballot does not spell out legal coercion. Press and radio campaigns aimed at getting out the vote American style did not overpower plaintiff's free will though they may have spurred him on to perform a civic duty. And as for rumors of loss of food rationing privileges—that I evaluate as so much make-weight, unsubstantiated talk. Rumors without even a semblance of foundation cannot stand as a firm base for a legal conclusion of coercion or duress. Surely, these rumors, even if true, did not overcome plaintiff's volition. He was a mature, 26-year old male in Japan, equipped with a University education, and quite capable of recognizing facts and distinguishing irresponsible rumor. In my view, the plaintiff has failed to prove his assertion that he was forced or compelled to vote. On the contrary, the evidence plainly indicates that he voted because he wanted to do his duty as a Japanese subject. His unsubstantiated, self-serving afterthoughts do not erase this fact.

" At this point, it would seem that the law as expressed in the cited cases would compel a holding that the plaintiff has lost his citizenship by said voluntary voting. And so it does—if 8 U.S.C. § 801(e) is constitutionally applied to such a case.

" As I have held before, I now hold again that 8 U.S.C. § 801(e), here invoked to show a loss of citizenship existing by birth, is outside the power of Congress and therefore unconstitutional as applied in these circumstances.

" The power of naturalization which Congress had under the Constitution is a power to confer citizenship, not a power to take it away. The simple power of the National Legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it so far as respects the individual. Nor has the Fourteenth Amendment conferred authority on Congress to restrict the effect of birth, which, under the Constitution, is a complete basis for citizenship. *Minoru Yasui* v. *United States*, 1943, 320 U.S. 115, 117, 63 S.Ct. 1392, 87 L.Ed. 1793; *Mackenzie* v. *Hare*, 1915, 239 U.S. 299, at page 306, 36 S.Ct. 106, 60 L.Ed. 297; *United States* v. *Wong Kim*

Ark, 1898, 169 U.S. 649, at page 703, 18 S.Ct. 456, 42 L.Ed. 890; *Perri* v. *Dulles*, 3 Cir., 1953, 206 F.2d 586.

" This is a government of enumerated powers, although it has full attributes of sovereignty within the limits of those powers. *In re Debs*, 1894, 158 U.S. 564, at page 578, 15 S.Ct. 900, 39 L.Ed. 1092. No attempt can reasonably be made now to limit the national powers strictly to those expressly mentioned, as other incidental or necessary powers are and must be implied to permit full exercise of the express powers. *United States* v. *Darby Lumber Co.*, 1940, 312 U.S. 100, at page 121, 657, 61 S.Ct. 451, 85 L.Ed. 609. However, we think it cannot be seriously contended that the power to confer citizenship requires, or even permits, as an aid to its exercise, the existence of an implied power to take citizenship away from a native without his consent. Except in the case of the exercise of the powers granted to Congress, and those necessarily implied therefrom, the crown of sovereignty fits badly and rests uneasily on the head of a government of enumerated powers. Sovereignty will not, by its bare assumption, justify this action against a citizen without his consent.

" Although the unilateral power of denaturalization cannot be demonstrated, still it seems to have been taken for granted that in connection with the federal matter of national citizenship there might be implied the ability to accept a declaration by a citizen that he shall shed the duties of allegiance and the privileges of citizenship. See *United States* v. *Wong Kim Ark*, 1898, 169 U.S. 649, 704, 18 S.Ct. 456, 42 L.Ed. 890; 15 Stat. 223 (1868); 8 U.S.C.A. § 1481 (a) (1, 6, 7). This declaration by the citizen may be found in his express words: *Savorgnan* v. *United States*, 1950, 338 U.S. 491, 70 S.Ct. 292, 94 L.Ed. 287,[1] or as a necessary inference from certain significant acts when voluntarily done, as in *Mackenzie* v. *Hare*, 1915, 239 U.S. 299, 36 S.Ct. 106, 60 L.Ed. 297. That case upheld validity of a statute which deprived any American woman, voluntarily marrying an alien, of her citizenship. The Court imputed knowledge of the consequences to the wife from the existence of the statute, in finding the loss voluntary on her part. However, it appeared that the unique nature of the marital relationship, the frequency of the application among nations of the theory of fusion on marriage of identities and nationalities into that of the husband, and the possible involvement of the United States in international probems in following a different policy justified the effect of the statute even though it resulted from an innocent and lawful act. The Court indicated that only conditions of national moment would justify such imputation of consent from an otherwise lawful and non-significant act; this indication was in answer to the fear expressed in argument that upholding that statute might make it possible that every act, however lawful, might be considered a renunciation of citizenship.

[[1] See *Annual Digest*, 1949, Case No. 59.]

" From very early times, it has been recognized that peculiar circumstances may give rise to dual citizenship and the ensuing multiplication of rights and duties in the same individual. Shanks v. Dupont, 1830, 3 Pet. 242, at page 248, 7 L.Ed. 666; Ops. Executive Depts. on Expatriation, Naturalization and Allegiance (1873) 17, 18; U.S. Foreign Relations, 1873–74, pp. 1191, 1192. (Latter two citations noted in *United States* v. *Wong Kim Ark*, 169 U.S. 649, at page 691, 18 S.Ct. 456, 42 L.Ed. 890.) It has also been recognized that where dual citizenship exists, one having it need not make a choice, but can continue his dual status: *Mandoli* v. *Acheson*, 1952, 344 U.S. 133, 73 S.Ct. 135, 97 L.Ed. 146,[1] and that an American having Japanese citizenship also has obligations to Japan arising from his presence in that country, which, together with his rights and privileges attached, need not necessarily be inconsistent with citizenship in the United States when they are observed in Japan: See Tomoya Kawakita v. United States, 343 U.S. 717, 725, 734, 72 S.Ct. 950 96 L.Ed. 1249. Furthermore, the Executive Branch of the United States is stated in Kawakita to have taken the position that a dual citizen who lives abroad *in the other country of his nationality* owes allegiance ' paramount ' to that then owed to the United States. As applied to such innocuous actions as voting, we think this position is entirely sensible, and not inconsistent with the Supreme Court's recognition in Kawakita of the possible existence of rights and duties pertaining to each citizenship which are not incompatible with each other.

" Whether Mackenzie would be decided the same way today is doubtful, but there may well be continuing validity in the basic principle there followed in imputing consent to expatriation from other acts relating to conditions of national moment, even if the acts are lawful. One of these significant acts might be the qualification to vote, and voting in a foreign election by a ' univalent ' American citizen—one who has no dual citizenship—but where it is done by a dual citizen, the act of voting in a foreign election, based upon his citizenship and physical presence there, loses much of its significance as an act of national importance to this country.

" It is doubtful that the exercise of the right to vote by citizens of another country could ever be of such importance to this country that it should take notice of such actions as being inconsistent with our national interests. It has importance, however, but in the sense that it is *consistent* with the policy of this country, in existence for many years, to encourage the use of the free ballot by other peoples, and nowhere can it be said that our influence has been stronger in this field than in Japan. (See Directive by General MacArthur re elections in Japan, cited in plaintiff's Exhibit 'M'). Such has been the action of the right hand of the United States, while with its left

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[[1] See *International Law Reports*, 1951, p. 251.]

it imposes severe civil penalties upon certain foreign-and-United States citizens who, while present in the foreign country, act in accord with the policy this country espouses. The existence of this policy makes it very difficult to suppose that such voting, there, by a few individuals of dual citizenship, could be an act of such moment to the United States in the sense that term is used in *Mackenzie*, that an imputation of consent to expatriation therefrom could be justified. We think no such imputation can be made, therefore, in this case. We regard these principles as distinct from the situation where a statutory measure is tested for substantive due process by asking whether it is a reasonable means of attaining an objective clearly within the power of Congress.

"Without this essential element of consent by the citizen, the statutory attempt to expatriate the citizen unilaterally is beyond the power of Congress, and therefore invalid. Thus, this petitioner did not lose his United States citizenship by a voluntary act of voting in occupied Japan."

[Report: 121 F. Supp. 6.]

NOTE.—The above case is noted in *Cornell Law Quarterly*, 40 (1955), p. 365, and in *New York University Law Review*, 30 (1955), p. 720.

Other cases involving expatriation by military service in a foreign army or by voting in a foreign election are *Gensheimer* v. *Dulles*, 117 F. Supp. 836 (D.N.J. 1954) (military service held involuntary); *Bruni* v. *Dulles*, 121 F.Supp. 601 (D.D.C. 1954) (expatriation for voluntary military service and voting); *Monaco* v. *Dulles*, 210 F.2d 760 (2d Cir. 1954) (defendant failed to prove by "clear, unequivocal and convincing" evidence that plaintiff took an oath of allegiance to the King of Italy).

Other grounds for expatriation were discussed in *Vidales* v. *Brownell*, 217 F.2d 136 (9th Cir. 1954) (remaining outside the United States in time of war to avoid military service); *Elizarraraz* v. *Brownell*, 217 F. 2d 829 (9th Cir. 1954) (accepting employment with the Government of a foreign State); *Fukumoto* v. *Dulles*, 216 F.2d 553 (9th Cir. 1954) (naturalization by a foreign country); *Gay* v. *Brownell et al.*, 120 F.Supp. 319 (D.P.R. 1954) (prolonged foreign residence by naturalized United States citizen); *Reaume* v. *United States*, 124 F.Supp. 851 (E.D.Mich. 1954) (prolonged foreign residence by naturalized United States citizen); *Petition of Acchione*, 213 Fd2. 845 (3d Cir. 1954) (failure to return to the United States within period fixed by Nationality Act of 1940); *Dulles* v. *Iavarone*, 221 F.2d 826 (D.C. Cir. 1954) (failure of dual national to take up residence in the United States on reaching majority); *Laranjo* v. *Brownell*, 126 F.Supp. 370 (N.D.Calif. 1954) (effect on citizenship of foreign-born child of subsequent revocation of parent's naturalization); *Application of Bernasconi*, 113 F. Supp. 71 (failure to return to State of nationality); *Perri* v. *Dulles*, 206 Fed. 2nd 586 (failure to return to State of nationality; effect of military service in foreign army and voting in foreign election).

Nationality—Loss of—The Law of the German Empire—Proof of Nationality—Foreign Law.

RIEGEL *v.* COUNCIL OF THE CANTON OF SCHAFFHAUSEN.

Switzerland, Federal Tribunal. February 26, 1954.

THE FACTS.—The appellant's father, who was of Prussian origin, went to Greenland in 1873 as a missionary, and there married a Swiss national. The appellant was born in Greenland in 1878. He now sought to obtain a declaration that he had acquired Swiss nationality at birth. In support of his claim he alleged that his father was stateless at the time of his marriage, that his mother had accordingly retained her Swiss nationality, and that he had acquired it through her in conformity with Article 5, para. 1, of the Law concerning the acquisition and loss of Swiss nationality. The Council of Schaffhausen rejected his claim. This was an appeal against that decision.

Held: that the appeal must be rejected. It had not been shown that the appellant's father had lost German nationality at the time of his marriage.

The Court said: " Article 5 of the Federal Law of September 29, 1952, concerning the acquisition and loss of Swiss nationality cannot be invoked in this case because it is not retroactive. The acquisition and loss of Swiss nationality depends on the law in force at the time of the occurrence of the material facts . . .

" The appellant claims that his father was stateless at the time of the conclusion of the marriage. He alleges that the latter renounced German nationality with binding force before going to Greenland in 1873.

" (a) According to para. 13 (1) and (3) of the German Law of June 1, 1870, concerning the acquisition and loss of Federal and State nationality that nationality could be lost (1) through release on demand (paras. 14 *ès*), . . . (3) through ten years' absence abroad (para. 21).

" Release is granted by means of a deed of release drawn up by a higher administrative authority of the State of origin (para. 14). That deed of release brings about the loss of nationality as from the date of its handing over (para. 18 (1)). Paragraph 15 provides that release must be granted if the petitioner proves that he has acquired the nationality of another German State. Where this does not apply (*e.g.*, in the case of departure from the territory of the Reich) release is made dependent on the fulfilment of certain conditions concerning military service obligations (para. 15 (2)). It has not been shown that there were any reasons relating to military service obligations which would have prevented release in the case before us.

" Loss of nationality through residence abroad takes place when German nationals leave the territory of the Reich and remain abroad for ten years without interruption. The time-limit is calculated from the time of departure from the territory of the Federation, or, in cases where the person leaving it is in possession of a passport or certificate of origin, from the date of expiry of that document. The time-limit is interrupted by registration with a German Consulate (para. 21 (1)). The loss of nationality extends also to the wife and to minor children under the father's authority, provided that they reside with him (para. 21 (2)). Germans who have lost their nationality through ten years' absence abroad and who return to the territory of the Reich, acquire the nationality of the State of the Federation in which they settle, by means of a deed of admission drawn up by a higher administrative authority, which must be issued on request (para. 21 (5)).

" (b) It has not been shown that the father of the appellant obtained a release from German nationality. The appellant alleges that his father renounced his German nationality on leaving the country, and invokes testimony to that effect. However, a renunciation of nationality was of no effect under the applicable legislation, as long as release had not been granted by the competent authority. Only the handing over of the deed of release brought about the loss of nationality (para. 18 (1)). There is no evidence that the father of the appellant was ever in possession of a deed of release; nor have official enquiries produced any grounds for the view that the father of the appellant was released from his nationality of origin upon his departure for Greenland.

" The fact that, upon his return to Germany at the turn of the century, he was not recognized by the German authorities as a German national, merely leads to the conclusion that he was no longer German at that time. It gives no indication of the date of the loss of the nationality of origin, and in particular does not show whether that nationality was already lost at the time of the departure for Greenland. The nationality might have been lost as a result of ten years' absence from the country (para. 21 (1)).

" Readmission to German nationality took place in Saxony, where he settled at the time of his return, as is expressly provided (para. 21 (5)) in the case of loss of nationality by absence from the country.

" The fact that the appellant himself was treated as a non-German by the German authorities at the turn of the century does not mean that he had not been German from the time of his birth. If his father, as the documents seem to indicate at present, lost his nationality of origin through ten years' absence abroad, *i.e.*, in 1883, that loss applied also to the son, who was at that time a minor (para. 21 (2)).

" Since it has not been shown that the father of the appellant had succeeded in obtaining his release from German nationality at the time of his departure for Greenland and was thus no longer a

German national in 1878, it cannot be assumed that the appellant would have been stateless from birth unless he was able to have the nationality of origin of his mother so that he became a Swiss national at birth."

[Report: *Arrêts du Tribunal fédéral Suisse,* vol. 80 (1954), I, p. 74.]

Nationality—Loss of—By Marriage to Foreign National—Marriage of Woman to Foreign National Invalid according to *Lex loci celebrationis*—Marriage Valid according to Personal Law of Foreign National—Whether Resulting in Loss of Wife's Nationality of Origin—The Law of Austria.

FEDERAL MINISTRY OF THE INTERIOR *v.* GOVERNMENT OF VIENNA.

Austria, Administrative Court. March 30, 1954.

THE FACTS.—In 1947 a woman of Austrian nationality married a British subject in Austria in accordance with the rites of the Church of England, the ceremony being performed by a British chaplain. Austrian law provides that a marriage celebrated in Austria shall not be valid unless the ceremony has been performed before an Austrian Registrar of Marriages. It further provides that an Austrian woman shall lose her Austrian nationality upon acquiring another nationality by marriage, and that Austrian citizens shall lose their nationality by expatriation resulting, *inter alia,* from acquisition of a foreign nationality by naturalization. It was contended in the present case that the woman here concerned had remained an Austrian citizen, notwithstanding her marriage to a British subject, because that marriage was invalid according to Austrian law. In support of the woman's case, she claiming to have lost her Austrian nationality, it was contended that she had lost that nationality as a result of her marriage, notwithstanding that the marriage was invalid according to Austrian law, on the ground that it was valid according to English law and therefore conferred British nationality upon her, and that this was equivalent in law to an expatriation so far as her Austrian nationality was concerned.

Held: that the woman was still an Austrian citizen because her invalid marriage could not be said to be equivalent in law to an expatriation allegedly resulting from the acquisition of British nationality according to English law.

The Court said: " The Federal Ministry [which appealed against the decision declaring the woman to be an Austrian citizen] proceeds on the assumption that the concept of expatriation by reason of the acquisition of a foreign nationality (section 7 (ii) in conjunction with section 9 (1) (i) of the Nationality Law) includes the concept (forming part of matrimonial law) of the loss of nationality by marriage (section 7 (i) in conjunction with section 8 (1) of the Nationality Law). The Ministry therefore argues that, notwithstanding that a state of fact belonging to the realm of matrimonial law (the celebration of a marriage in Austria before a member of the British forces), which results in the acquisition of another nationality by the woman according to foreign [English] law, but which in Austria does not fall within the framework of section 8 (1) for reasons connected with the form of the marriage, must nevertheless be deemed to be an expatriation by means of the acquisition of a foreign nationality. This contention is ill-founded in law. The two concepts are clearly distinct. Where an Austrian woman marries a foreign national it is the marriage, and not the acquisition of a foreign nationality resulting from the marriage, which brings about the loss of nationality. The relationship of the provision governing the loss of nationality by expatriation resulting from the acquisition of a foreign nationality to the provision governing loss of nationality by marriage to a foreign national is not that of *lex generalis* to *lex specialis*. . . . It follows from the invalidity of this marriage, so far as concerns Austria, that this marriage did not result in the loss of Austrian nationality."

[Report: VwGH (A), 9 (1954), p. 217.]

Nationality—Loss of—By Expatriation—Monk of Mount Athos Abroad Failing to Renew Leave of Absence—The Law of Greece.

MOUNT ATHOS (NATIONALITY) CASE.

Greece, Conseil d'État. 1954.

(Soliotis, President.)

THE FACTS.—Article 103 of the Greek Constitution, which governs the administrative autonomy of Mount Athos, provides, *inter alia*, that " all the monks of Mount Athos shall acquire, without other formality, Greek nationality on their reception as novices or as monks ". The object of this provision for the compulsory acquisition by all the monks of Mount Athos of the status of Greek nationality is, on the one hand, to enable them to enjoy the protection to which Greek *ressortissants* are entitled and, on the other hand, to make them subject to Greek law, except as to certain matters specifically mentioned in Article 23 (notably those concerning the administration of the monasteries). Under Article 4 of the Presidential Decree of August 12/13, 1927 (ratifying the Decree of September 13/15, 1926, modifying certain provisions of the civil law), Greek nationals of foreign origin who leave Greek territory not intending to return lose their Greek nationality.

The appellant, a former monk of Mount Athos, obtained leave of absence and left Greece in 1950. He omitted to obtain from his monastery a renewal of his leave for the period from April 5, 1952, to March 27, 1953. He was also consecrated as a regular priest in a foreign country with the avowed object of celebrating divine service in a chapel there. In view of these facts, the Greek administrative authorities treated him as having lost his Greek nationality under the Presidential Decree of 1927. He appealed from this decision, contending that a monk who has acquired Greek nationality by admission to a monastery on Mount Athos cannot subsequently lose it by application of Greek law.

Held: that the appeal must fail. The appellant had lost his Greek nationality.

The Court said: "Article 103 of the Constitution does not exclude the application to monks who have acquired Greek nationality under it of the special provisions of the Presidential Decree of 1927. A monk who leaves the country definitively, that is, without the intention of returning, so far as that fact may be objectively established, cannot—at least in this particular case—invoke a privilege resulting from the acquisition of Greek nationality by virtue of a positive provision of the Constitution and as the result of [his status of monk]. The appellant claims that that privilege would exclude, so far as concerns him, the application of the Greek Law governing the loss of Greek nationality. But it is precisely that status of monk of Mount Athos which he renounces indirectly on definitively leaving Greek territory, and at the same time the region of Mount Athos, without intending to return to Greece. In such a case, any protection which may be accorded by Article 103 of the Constitution on the basis of his status of monk loses that basis because anyone who leaves the country in that way effectively ceases to be one of the number of persons who live a monastic life on Mount Athos.

"The Administration was therefore right in applying to the appellant Article 4 of the Presidential Decree of August 12/13, 1927, and in regarding as conforming with the juridical idea of departure without intending to return—which is the legal condition precedent to the application of the provisions of that Article—those circumstances which had come to its knowledge, and in particular (a) the appellant's failure to renew his application for leave of absence over a period of more than one year, and (b) his consecration as a priest abroad. On the strength of these facts the Administration was right in deciding that the legal condition had been fulfilled for the appellant, a Greek national of foreign origin, to be regarded as having lost Greek nationality by having left Greek territory without intending to return."

[Report: *Revue Hellénique de Droit International,* 8 (1955), p. 303.]

Nationality—Deprivation of—By Law—Effect on Nationality Status of Repeal of Denationalization Law.

CASPERIUS *v.* CASPERIUS.

Israel, Supreme Court sitting as Court of Civil Appeals.

(Silberg, Goitein and Landau JJ.)

October 28, 1954.

THE FACTS.—By the law of Israel (and formerly of Palestine), the material validity of a will of a foreigner, *i.e.*, a person who is not an Israel (Palestinian) national, is governed by the testator's national law, or by Jewish law if the testator, a Jew, was stateless. In this case the testator, the appellant's mother, a Jewish immigrant from Germany, had on July 6, 1939, executed in Palestine a holograph will which was unwitnessed. At the date of making the will, the testator was a German national and the will was valid by German law (para. 2231, BGB). Furthermore, at that time it would have been valid in Palestine to pass the property of a testator of German nationality. On November 25, 1941, the German Government passed a Law (RGBl, 1941, Part I, p. 1146) in implementation of the German Nationality Law of 1938, depriving of his German nationality any Jew living outside Germany. By Control Council Law No. 1 of September 20, 1945, the Laws of 1938 and 1941 were repealed. However, German nationality was not automatically restored to those who had been deprived of it. Such persons could apply to the competent authority to have it restored. The testator had not applied for restoration of German nationality.

Held: that, on the question of the law governing the will, the validity of the will must be determined as at the date of death. On that date the testator was stateless, and the will would therefore be governed by Jewish and not by German law.

On the question of nationality, the Court said (*per* Silberg J., the other Judges concurring): "Before discussing the principal issues in this case, we have to consider the preliminary question, namely: Was the testator on the date of her death a German national or stateless? Counsel for the appellant argued that since the German Law of 1941 had been conceived in the evil spirit of Nazism, this Court, like the court of any other civilized State, cannot recognize the validity of the said law and the testator therefore remained a German citizen until her death. To this we reply: this idea, in itself, is sound; however, it is not competent to enable our testator to acquire the nationality of the Nazi State. This is not like any other legal question. Otherwise, we would reach the ridiculous conclusion that, precisely because of the barbarism of the Nazi laws, a man in Israel will have to be regarded as a citizen of that barbarian State. It goes without saying that all the Nazi racial laws stand condemned in our eyes, but we are not prepared to rely on that invalidity in order to recognize, so far as concerns a Jew, the legal nexus with that base régime. Our opinion, therefore, is that despite the unconcealed anti-semitic motives of that Law, it was capable of snapping the legal tie between the State and the citizen."

[The rest of the judgment deals with questions of private international law and municipal law which result from the finding on the preliminary question that the will, valid when made, had become invalid on the date of the death because of the intervening change of the nationality status of the testator.]

[Reports: *Piskei-Din*, vol. 8 (1954), p. 1289; *Pesakim Elyonim*, vol. 17 (1955), p. 47.]

NOTE.—On the German Law of 1941 and its repeal see Lauterpacht "The Nationality of Denationalized Persons", in *Jewish Yearbook of International Law*, 1948, p. 164.

Nationality—Loss of—Failure to Reside in State of Nationality—The Law of the United States of America.

See p. 168 (*Lee Wing Hong et Al.* v. *Dulles*).

XI.—Statelessness

Statelessness—Legal Question of—Statelessness Not to Be Presumed.

HIRSCHENHORN *v.* ATTORNEY-GENERAL.

Israel, Supreme Court sitting as Court of Criminal Appeal.

(Ollshan C.J; Silberg and Goitein JJ.)

November 26, 1954.

This was an appeal from a conviction on a charge of bigamy. As this was a question of personal status, it partly depended upon the nationality or absence of nationality of the appellant at the date of the second marriage. The first marriage had been celebrated in the year 1946, when the appellant, a refugee from Poland, was living in Samarkand (Russia). The second marriage was celebrated in 1952 in Israel. The appellant's nationality in 1946 was not established. The lower Court had found that in 1952 the appellant was stateless, but this fact was in dispute; and the fact of that dispute formed one of the grounds of appeal.

It was *held* on various grounds, not here relevant, that the conviction must be quashed. On the question of statelessness, Judge Silberg made the following remarks: "I am inclined to think that it has not been proved that in 1952 the appellant was stateless. The only evidence for this is a statement he made in applying for an identity card under the Registration of Inhabitants Ordinance, 1948. That application was made to the appropriate National Registration Office. I doubt if we can rely on that in a criminal case. The question whether a man is stateless or if he is still bound by some legal tie with one or other of the States of this universe, is an extremely complicated legal question, especially in this generation of ours which has witnessed two great world wars. For that reason I have great hesitation in saying that it is possible to regard the above-mentioned statement as evidence of statelessness."

[Reports: *Piskei-Din*, vol. 8 (1954), 1300 at p. 1306; *Pesakim Elyonim*, vol. 17 (1955), 177 at p. 183.]

Statelessness—Stateless Persons—Position of—Security for Costs.

See p. 303 (*Security for Costs* (*Statelessness*) *Case*).

C—ALIENS

II.—Position of Aliens

i.—Subjection to Territorial Sovereignty of Receiving State

Aliens—Liability for Military Service—Alien Admitted for Permanent Residence—Relevance of Constitution of International Refugee Organization—The Law of the United States of America.

UNITED STATES *v.* RUMSA.

RUMSA *v.* HERSHEY *ET AL.*

United States, Court of Appeals, Seventh Circuit. May 13, 1954.

THE FACTS.—Rumsa, a native of Lithuania, became a refugee in 1944 when Russia invaded that country. In 1950, he applied for an immigration visa to the United States and declared his intention to remain permanently in that country. He was admitted as a displaced person in April 1950, and thereafter registered for military service under the Selective Service Act. In January 1951, Rumsa was ordered to report for a medical examination. He protested against being required to undergo this examination and contended, *inter alia*, that he was, as an alien, not subject to induction. He was thereafter permitted to execute a form claiming relief from military service as an alien, which form provided that the alien claiming such relief " shall thereafter be debarred from becoming a citizen of the United States ". He was deferred as an alien until January 1952, but at that time he was again ordered to report for a medical examination and, upon that examination, was found fit for military service. He again executed a form claiming exemption as an alien, in which he stated that he had not been admitted to the United States for permanent residence. Upon Rumsa's refusal to report for induction, he was indicted therefor and found guilty of an offence. Rumsa sought an injunction against his induction and a declaratory judgment, but this relief was denied him by the District Court.

On appeal,

Held: that the judgment of the District Court in the criminal action and the order of the District Court in the civil action must be affirmed. The Universal Military Training and Service Act authorized the induction of aliens who had been admitted to the United States for permanent residence and would prevail over any treaty providing for exemption of any category of aliens from induction into the United States armed forces. The Constitution of the International Refugee Organization[1] and the United States act accepting membership therein did not support the plaintiff's contention that displaced persons were admitted only for temporary residence.

The Court said: " There can be no question but that the Universal Military Training and Service Act as amended authorized the selection and induction of aliens who had been admitted to the United States for permanent residence. Section 454 (a) of 50 U.S.C.A. Appendix, § 4 (a) of the Universal Military Training and Service Act, as amended June 19, 1951, expressly provided:

' Except as otherwise provided in this title . . . every male alien *admitted for permanent residence* . . . shall be liable for training and service in the Armed Forces of the United States . . . .'

And Section 456 of 50 U.S.C.A. Appendix, which gave to the President broad powers to exempt various classes of aliens, expressly provided:

' . . . except that *aliens admitted for permanent residence* in the United States shall not be so exempted.' (Our emphasis.)

This Act also provided, 50 U.S.C.A. Appendix, § 467 (a):

' Except as provided in this title all laws or any parts of laws in conflict with the provisions of this title are repealed.'

Such clear language leaves no ambiguity for interpretation. We may only apply such a law as it is written.

" If the United States had made a prior treaty with Lithuania or an agreement with other nations providing that Lithuanian subjects or other aliens should not be inducted into our armed forces, such a treaty or agreement would be in conflict with the provisions of the Universal Military Training and Service Act as amended, and this later Act of Congress would prevail. Where such a treaty or agreement is in conflict with a later conscription statute enacted by Congress the treaty or agreement is thereby suspended insofar as it conflicts, and, therefore, cannot be invoked as a defense to a violation of the conscription law. *Ex parte Blazekovic,* D.C., 248 F. 327, 337; *Ex parte Larrucea,* D.C., 249 F. 981, 983. In American Jurisprudence we find the general principle and the exception thereto stated as follows:

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[1] *U.N.T.S.*, vol. 18 (1948) p. 4.

'It is a general principle that an alien is exempt from military duty in the country in which he is residing. Nevertheless an alien is not necessarily exempt from military service by virtue of a treaty entered into before enactment of a Conscription Act, since a treaty, like any other law of the United States, may constitutionally be repealed or suspended by Congress. Whether or not an alien resident within the United States is subject to military service depends ultimately, therefore, upon the terms of the draft law.' 2 Am.Jur., p. 475, Sec. 26.

" The defendant's contention that he was deprived of his constitutional right to due process by being required to submit to induction in our armed forces is answered against him in *United States* v. *Lamothe,* 2 Cir., 152 F.2d 340, 342, and in the decisions of many other federal courts.

" The defendant stresses the fact that he was admitted to the United States as a ' displaced person ' and contends that the Constitution of the International Refugee Organization contemplated that such persons were to be admitted by other nations only with the idea that such displaced persons were to be returned to the country of which they were nationals at the earliest practicable time. But this constitution also expressly provided that where such repatriation did not take place the member nations of the organization might facilitate '*the emigration to, resettlement and re-establishment in other countries of such individuals or family units.*' (Our emphasis.) This language clearly shows that in cases such as Lithuania, where the nationals of the country who had been displaced could not safely be returned to their native land, they might be admitted to other countries for permanent residence.

" It is significant that Congress, in the Joint Resolution authorizing the President to accept membership by the United States in the International Refugee Organization, expressly conditioned such authorization on the reservation that such acceptance should not constitute or authorize action ' (1) whereby any person shall be admitted to or settled or resettled in the United States . . . without prior approval thereof by the Congress, and this joint resolution shall not be construed as such prior approval,' or ' (2) which will have the effect of abrogating, suspending, modifying, adding to, or superseding any of the immigration laws or any other laws of the United States.' 22 U.S.C.A. § 289. This Joint Resolution so authorizing the acceptance of membership by the United States was approved July 1, 1947. The next year, 1948, Congress enacted Public Law 774, 50 U.S.C.A. Appendix, § 1951 et seq., under the terms of which the defendant and others were admitted to the United States as displaced persons. In this later Act Congress carefully defined the displaced persons who were eligible for admission into the United States. In Section 1951 (c) a displaced person to be eligible for admission to the United States under that paragraph, in addition to other qualifications, was required to be one ' who has not been firmly resettled ', and ' who is qualified under the immigration laws of the United States for admission into the United States for permanent residence '. Paragraph (d) of the same Section 1951 provides that a displaced person to be eligible for admission to the United States under that paragraph must, among other requirements, be (1) one who could not return to the country from which he was displaced because of fear of persecution on account of race, religion or political opinions; (2) ' whose admission into the United States for permanent residence is recommended by or on behalf of the Secretary of State and the Secretary of Defense '; and (3) ' who is qualified under the immigration laws of the United States for admission into the United States for permanent residence '.

" A study of the Constitution of the International Refugee Organization, of the Joint Resolution authorizing acceptance by the United States of membership therein, and of the Act authorizing the admission into the United States of displaced persons convinces us that the contention of counsel for the defendant that the local board and the District Court were required to find that the defendant was not admitted to the United States for permanent residence is unsound. We are more inclined to the belief that the language of the Act under which Rumsa was admitted tends to support a finding that he was admitted for permanent residence.

[The Court then proceeded to a discussion of the reviewability of the decision of the local board, the propriety of the change in Rumsa's classification, and the question of Rumsa's permanent residence.]

" Counsel for the defendant have earnestly argued to us that the conscription of aliens is extremely bad policy on the part of the United States; that prior to the enactment of the Universal Military Training and Service Act the United States and most other nations had consistently refused to draft aliens; that the new policy which Congress adopted in 1951, if followed, will in effect invite other nations to force our nationals who may be residing in those countries to submit to service in their armies; and that, therefore, none of our nationals residing abroad will be safe from conscription by those countries or from the many dangers which service in foreign armies entails.

" Even if all this be true there is nothing the courts can do about it. The question of whether or not aliens should be conscripted is a question of policy—a political question which is for the executive and legislative branches of the Government to solve. Such questions are entirely outside the realm of the judicial branch. *Coleman* v. *Miller*, 307 U.S. 433, 455, 59 S.Ct. 972, 83 L.Ed. 1385; *United States* v. *Lamothe*, 2 Cir., 152 F.2d 340.

"The grant of power to Congress to raise and support armies is certainly sufficient to authorize the adoption of the present policy to conscript aliens. It is, of course, also within the power of Congress to change the conscription law to again excuse aliens from service in our armed forces at any time Congress determines that the services of aliens are either unnecessary or should not as a matter of policy be required. . . ."

(As to the action for an injunction, the Court pointed out that the plaintiff had failed to take the requisite administrative steps to entitle him to judicial review of his classification.)

[Reports: 212 F.2d 927; *certiorari* denied, 348 U.S. 838, 99 L.Ed. 661, 75 Sup. Ct. 36 (1954).]

NOTE.—The correctness of the dictum of the Court concerning the effect of the enactment of the Universal Military Service and Training Act on a treaty affording aliens relief from military service was questioned by Wyzanski J. in *Schenkel* v. *Landon, District Director, Immigration and Naturalization Service*, 133 F.Supp. 305 at 309–310 (D. Mass. 1955), a case involving a Swiss national.

Aliens—Members of Visiting Foreign Armed Forces—Privileges and Immunities.

See p. 111 (*Regina* v. *Birkenhead Borough Justices, Ex parte Smith*).

iii.—Treatment by and Responsibilities of the Receiving State

[*See also* PART V, STATE RESPONSIBILITY.]

Aliens—Treatment of—Right of Non-resident Alien to Inherit Property from Resident of State Concerned—Construction of Treaty—Effect of Statutory Requirement that Payment Be Made Only If It Will Be Received by Payee—The Law of the United States of America.

PETITION OF MAZUROWSKI.

United States, Supreme Judicial Court of Massachusetts.

January 7, 1954.

THE FACTS.—Leon Mazurowski died intestate in Massachusetts in 1942. A public administrator was appointed and was required to deposit the distributive shares of Mazurowski's wife and three children, who were nationals and residents of Poland, in a savings bank for their benefit. Petitions were brought by the wife and children, represented by the Consul-General of Poland, to require payment to them of the balances of these deposits. The Consul-General claimed the right to receive the deposits both by virtue of his consular office and under powers of attorney. The trial Judge made an order requiring the petitioners to appear personally before the Court " to assist in establishing such claimant's identity, right and opportunity to receive the fund ", pursuant to a Massachusetts statute (Mass. Ann. Laws c. 206, § 27A (1955)) which provides:

> " Whenever payment of a legacy or distributive share cannot be made to the person entitled thereto, or such person may not receive or have the opportunity to obtain said legacy or distributive share, the court, on petition of an interested party or in its discretion, may order that the money be deposited in a savings bank or other like institution, or invested in the manner provided in section twenty-five, and disposed of in the manner provided in section twenty-eight. When a claimant to such funds resides outside of the United States or its territories, the court in its discretion, in order to assist in establishing such claimant's identity, right and opportunity to receive such fund, may require the appearance in person before the court of such claimant."

The petitioners contended that the orders of the Judge were in contravention of the Treaty of Friendship, Commerce and Consular Rights between the United States and Poland, signed at Washington, June 15, 1931, T.S. No. 862, 48 Stat. 1507.

On appeal,

Held: that the orders of the probate court must be affirmed. The special privileges and rights of Polish consular officers had ended with the termination of the Treaty on January 5, 1952, and any property rights surviving the termination of the Treaty were subject to reasonable local regulation of the distribution of the estates of deceased residents. Since the petitioners would receive no more than twenty per cent. of any payment to them, the Polish Consul-General was not entitled to receive the deposits.

The Court said: " The portions of the Treaty with which the orders are said to conflict are found in the second paragraph of Article 4, in the third paragraph of Article 23, and in Article 24. The passages in Articles 23 and 24 relate to the right of consular officers as such to appear for their nationals in matters concerning the administration and distribution of estates and in their behalf to collect and receipt for their distributive shares. We are informed by the Department of State that the treaty was terminated January 5, 1952, pursuant to a notice given to the Polish government on July 5, 1951. All special powers and privileges of consular officers as such, not being property rights, came to an end with the termination of the treaty, and we need not further consider Articles 23 and 24.

" Article 4, however, in its second paragraph, purports to confer property rights which might survive the termination of the Treaty.

See *Santovincenzo* v. *Egan*, 284 U.S. 30, 52 S.Ct. 81, 76 L.Ed. 151.[1] That paragraph reads,

'Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases.'

"Provisions in treaties phrased in this manner apply only where the decedent was a national of the foreign country. *Clark* v. *Allen*, 331 U.S. 503, 514–516, 67 S.Ct. 1431, 91 L.Ed. 1644.[2] The record fails to disclose whether in this instance the decedent was a Polish national. If he was not, the treaty gave no rights to his widow and next of kin. But even if the decedent was a Polish national, we do not understand that Article 4 of the Treaty gave to his widow and next of kin paramount rights to seize their shares in his estate regardless of the laws of this Commonwealth providing for the orderly settlement and distribution of the estates of deceased persons domiciled here. The foreign heir or distributee acquires his rights by the law of this Commonwealth and is bound by the provisions of that law as to the time and manner of distribution. *Lyeth* v. *Hoey*, 305 U.S. 188, 193, 59 S.Ct. 155, 83 L.Ed. 119; *Irving Trust Co.* v. *Day*, 314 U.S. 556, 563, 62 S.Ct. 398, 86 L.Ed. 452; *United States* v. *Burnison*, 339 U.S. 87, 91–92, 70 S.Ct. 503, 94 L.Ed. 675. The Treaty did not purport to create special rights of succession in favour of aliens. *Clark* v. *Allen*, 331 U.S. 503, 517, 67 S.Ct. 1431, 91 L.Ed. 1633.[2] No doubt the primary object and possibly the only effect in practice of the paragraph quoted from Article 4 were to secure the nationals of the foreign State against discrimination.

"The question then at once arises whether § 27A is any more than a reasonable local regulation governing the distribution of the estates of deceased residents. In answering that question it becomes necessary to take into account conditions existing today in certain foreign countries, including Poland, which the Legislature no doubt had in mind in enacting the statute. See article entitled 'Estates and "The Iron Curtain"' in Mass. Law Q., Vol. 35 (1950), No. 2, page 34. The judge of probate ruled, we think rightly, that 'Inasmuch as there was no adverse party' the responsibility rested upon the judge 'to see that the proper parties are entitled to receive the funds at their full value.' Accordingly, acting *sua sponte*, he made inquiries from the Department of State and was advised that

[1] See *Annual Digest*, 1931–1932, Case No. 114.]

[2] *Ibid.*, 1947, Case No. 82.]

according to the information of that Department under Polish foreign exchange regulations dollar funds, whether remitted through banking channels or through a Polish consular officer, are retained by the Polish government and the persons to whom the remittances are directed receive Polish currency at the rate of approximately four zlotys to the dollar; and that the same regulations were understood to provide that permanent residents of that country must report to the government of Poland 'against reimbursement in local currency' at the same rate. A recent communication to us from the Department of Justice confirms this information and further advises us that the prevailing free rate of exchange is approximately twenty zlotys to the dollar, and that United States government personnel in Poland are paid at the rate of twenty-five zlotys to the dollar. Moreover, by U.S.C. (1946 ed.) Title 31, § 123 [31 U.S.C.A. § 123], it is provided that no check or warrant drawn against funds of the United States shall be sent for delivery in a foreign country in any case in which the Secretary of the Treasury determines that postal, transportation or banking facilities in general, or local conditions in the country to which such check or warrant is to be delivered are such that there is not a reasonable assurance that the payee will actually receive such check or warrant and be able to negotiate the same for full value. The Secretary of the Treasury by Department Circular No. 655, as amended April 17, 1951, 16 Fed.Reg. 3479, determined that conditions in about a dozen named countries behind the 'Iron Curtain', including Poland, were such 'that there is not a reasonable assurance' that payees in those areas will actually receive such checks or warrants and be able to negotiate them for full value. There is no reason to suppose that a transfer of funds such as is sought by these petitions would meet with any better fate. We think that it was proper for the judge of probate to avail himself, and that it is proper for us to avail ourselves, of superior sources of information on such matters relating to foreign law and administrative regulations possessed by the high executive officers of the government, but not directly available to the courts or to litigants. *Universal Adjustment Corp.* v. *Midland Bank, Ltd.*, 281 Mass. 303, 327, 184 N.E. 152, 87 A.L.R. 1407;[1] *Matter of Braier's Estate*, 305 N.Y. 148, at pages 157–158, 111 N.E.2d 424;[2] G.L.(Ter.Ed.) c. 233, § 70.

" The result of the best information we have been able to obtain is that there is no reasonable assurance that money sent to many of the countries behind the 'Iron Curtain' will be received by the payees at full value, and that as to Poland, the payees would receive no more than about twenty per cent. of full value, the remaining eighty per cent. being in effect confiscated by the Polish state.

" When projected against this background § 27A seems to us a reasonable and valid regulation of the final distribution of estates of deceased residents of this Commonwealth designed to preserve the property interests of the distributees. Such a regulation is binding upon distributees, even though enacted after the death of the decedent. [Citations omitted.] The statute is in no sense discriminatory against nationals of Poland or of any other country. It would apply equally, under similar conditions, to a national of the United States residing in Poland or other foreign country.

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[1] See *Annual Digest*, 1935–1937, Case No. 215.]

[2] See *International Law Reports*, 1953, p. 386.]

" For a number of years the surrogates of New York have upheld and applied in respect to distributees in various countries a statute of that State generally similar to the first sentence of § 27A. *Matter of Weidberg's Estate*, 172 Misc. 524, 15 N.Y.S.2d 252[1] (Germany); *Matter of Geffen's Estate*, 199 Misc. 756, 104 N.Y.S.2d 490 (Lithuania); *Matter of Yee Yoke Ban's Estate*, 200 Misc. 499, 107 N.Y.S. 2d. 221[2] (China); *Matter of Best's Estate*, 200 Misc. 332, 107 N.Y.S.2d 224[3] (Soviet Union); *In re Rysiakiewicz' Will*, Sur., 114 N.Y.S.2d 504 (Poland). These and other similar decisions appear to have been confirmed by the Court of Appeals in *Matter of Braier's Estate*, 305 N.Y. 148, 111 N.E.2d 424[4] (Hungary). See *Estate of Blak*, 65 Cal. App.2d 232, 150 P.2d 567.

" There may be more doubt about the second sentence of the statute, under which the present orders were made, than about the first sentence. If these orders were in their nature final and if they irrevocably established that the petitioners could have the deposits only by coming here for them, a very different case would be presented. But the orders are merely temporary. They could be made in the first place only ' in order to assist in establishing such claimant's identity, right and opportunity to receive such fund ' and they can be continued in effect only as long as the judge still feels that the identity, right and opportunity of the petitioners to receive the funds are not otherwise sufficiently established. The world is still in a state of flux and uncertainty. It is still possible that more nearly normal relations will be resumed between nations. It is possible that a more realistic rate of exchange will be officially adopted in Poland. Many unforeseen events may profoundly alter present conditions. We do not think that we can as yet say that the deposit of the money and the orders of the court amount to a deprivation of the petitioners' property rather than a protection of it, especially as the present alternative seems to be that in order to receive twenty per cent. of their money they would be obliged to sacrifice the other eighty per cent.

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[1] See *Annual Digest*, 1938–1940, Case No. 27.]

[2] See *International Law Reports*, 1952, Case No. 93.]

[3] *Ibid.*, 1953, p. 399.]

[4] The case cited deals in part with so-called " blocked " funds. No question of " blocking " arises in the case before us, since General License No. 97 of the Secretary of the Treasury, 13 Fed.Reg. 891, unblocked all funds in any account where the amount on February 1, 1948, did not exceed $5,000 [see *International Law Reports*, 1953, p. 386].

"The result is that the Consul-General is not now entitled to receive the deposits either in his official capacity or as attorney in fact for the petitioners, and that the orders of the judge of probate must be affirmed."

[Reports: 331 Mass. 33, 116 N.E.2d 854.]

NOTE.—(1) The above case is noted in *Michigan Law Review*, 53 (1954), p. 142, and in *University of Pennsylvania Law Review*, 102 (1954), p. 945.

(2) In *Re Leefers' Estate*, 127 Cal. App. 2d 550, 274 P.2d 239 (1954), a California District Court of Appeal *held* that German nationals were not entitled to inherit the personal property of the decedent, a citizen of the United States, because of the absence of a corresponding right of United States nationals, at the time of the decedent's death in 1944, to take property under the same terms and conditions as residents of Germany. The Supreme Court of Montana *held* in *Re Gaspar's Estate*, 128 Mont. 325, 275 P.2d 656 (1954) that Roumanian law would permit nationals of the United States to receive property bequeathed to them by Roumanian decedents and that Roumanian heirs of a decedent United States national might accordingly share in the distribution of the decedent's estate. Both cases involved statutes conditioning the right of foreign nationals to succeed to the property of nationals of the United States on the existence of a reciprocal right of United States nationals to receive property by descent or devise from nationals of the State concerned. In *Pavlick* v. *Meriden Trust & Safe Deposit Co. et al.*, 141 Conn. 471, 107 A.2d 262 (1954), the Supreme Court of Errors of Connecticut *held* that, under the law of Connecticut, a non-resident alien is incapable of taking title to real property in Connecticut by purchase, devise, or otherwise.

Aliens—Treatment of—Violation of Duty by Officials *vis-à-vis* Aliens—Liability of Public Authority for Damage Caused—Requirement of Reciprocity—The Law of Germany.

PUBLIC AUTHORITIES (LIMITATION OF LIABILITY) CASE.

German Federal Republic, Federal Supreme Court. May 10, 1954.

THE FACTS.—Article 34 of the Constitution of the Federal Republic of Germany provides that where an official violates the duties of a public office entrusted to him (thereby causing damage to a third person), legal liability shall attach to the State or the public authority in whose service the official is employed. A Law enacted in 1909 provided that a public authority was not liable to an alien who suffered damage as a result of a violation of duty by an official unless the law of the foreign State concerned or a relevant treaty between Germany and that State provided for reciprocity. The plaintiff was a Polish national. She alleged that she had suffered damage as a result of a violation of duty by an official of the City of Berlin. She contended that the City of Berlin was liable even in the absence of reciprocity as required by the Law of 1909, on the ground that Article 34 of the Constitution provided independently for the liability of public authorities towards German citizens and aliens alike.

Held: that as there was no treaty between Poland and Germany, and no Polish law providing for reciprocal treatment for German nationals in Poland, the plaintiff's action must fail. The Law of 1909, though enacted at an earlier date than the Constitution, was a *lex specialis* which limited the liability of German public authorities towards aliens to cases in which reciprocity was guaranteed.

The Court said, in part: "The continuing operation of s. 7 of the Prussian Law [the Law of 1909 referred to in the headnote] at the time when the Weimar Constitution was in force was affirmed by the Reichsgericht (Supreme Court of the former German Reich) in a case in which a Turkish firm brought an action against the Reich. The Reichsgericht regarded the provision contained in s. 7 as a kind of anticipated implementary legislation of Article 131 of the Weimar Constitution.[1] This Court has previously held, with regard to the exclusion of liability for notaries public and post office officials, that limitations of the liability of public authorities continue to remain inoperative, and that in this respect Article 34 of the Federal Constitution has the same effect as Article 131 of the Weimar Constitution. There is no reason to take a different view of limitations of liability *vis-à-vis* aliens."

Having found as a fact that there was no treaty between Poland and Germany, and no Polish municipal law guaranteeing reciprocity to German nationals in Poland, the Court dismissed the plaintiff's appeal.

[Report: BGHZ, 13 (1954), p. 241.]

Aliens—Treatment of—Right of Residence—Exercise of Discretion by Administrative Authority—The Law of Germany.

RESIDENCE OF ALIEN TRADER (GERMANY) CASE.

German Federal Republic, Administrative Court of Appeal of Münster.
April 13, 1954.

THE FACTS.—The appellant, an Italian national, was an itinerant trader whose residence permit in Germany had expired. When he applied for a new permit his application was refused, on the ground that an alien was not entitled to claim the right of continued residence, and that the German authorities were therefore entitled, in their discretion, to refuse to issue a new permit. In the present appeal the appellant contended, *inter alia,* that there was a general rule of international law which conferred a right on aliens to reside in foreign countries unless it could be said that they were undesirable, and as in the present case the application for a new permit had been refused on the ground that there were too many itinerant traders in Germany, the German authority concerned had exercised its discretion improperly, and the appeal should therefore be allowed.

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[1] This was the provision corresponding to Article 34 of the present Constitution of the German Federal Republic.

Held: that the appeal must be dismissed. There was no rule of international law which conferred a right of residence on aliens, and the German authority concerned had not exercised its discretion improperly.

The Court said: " While a State is not allowed to shut itself off from general international intercourse, it is under no duty, according to the general principles of international law, to admit individual aliens. Every State is entitled, in its discretion, to restrict or refuse the admission of aliens. It is significant that Articles 11 and 12 of the Constitution confer the rights of unrestricted movement, choice of occupation and place of work only ' on all Germans ', and not on foreign nationals. It follows that an alien's right of residence can only be based on special international agreements. There is no Treaty of Establishment between Germany and Italy. The [European] Convention on Human Rights and Freedoms, of November 4, 1950, which has been signed by the Federal Republic of Germany as well as by Italy, grants to nationals of the Contracting Parties only the general personal rights of freedom, but does not provide for any right of residence or economic activity. As, in accordance with the foregoing, the appellant has no right to claim the issue to him of a residence permit, his action could succeed only if the authority concerned had exercised its discretion improperly. This is not the case here. The decision which resulted in the refusal of the permit applied for gave reasons based on economic considerations. The contention of the appellant that the only relevant factor is his personal reliability, is misconceived. The authorities are entitled to take into account the fact that a particular trade is overcrowded and that it is therefore undesirable for aliens to engage in it. This Court cannot substitute itself for the administrative authority concerned in determining this question, because the determination of the relevant circumstances is left exclusively to the discretion of the authority concerned."

[Report: NJW, 7 (1954), p. 1822.]

Aliens—Treatment of—*Cautio judicatum solvi*—Treaties—Operation and Enforcement of—Application to Non-Metropolitan Territories—Application to Algeria of Treaties Ratified by France.

PIMEA LTD. *v.* KÜNDIG.

Switzerland, Federal Tribunal. January 13, 1954.

THE FACTS.—This was an appeal by a limited liability company with its seat in Oran (Algeria). The defendant asked the President of the Second Division of the Federal Tribunal to order the appellant Company to give security for costs. The President ordered the deposit of Fr. 300 as security for costs, on the following grounds:

"The appellant company is domiciled abroad and accordingly liable to provide security for costs. This requirement is not excluded either by the International Convention concerning Civil Procedure of July 17, 1905, or by the Franco-Swiss Treaty of June 15, 1869.

"The International Convention admittedly provides in Article 17 for exemption from the provision of security for costs irrespective of residence. However, according to Article 26 thereof, the Convention applies, in the absence of any indication to the contrary, only to the European territories of the Contracting Parties. France did not extend its applicability to Algeria. Accordingly, Article 17 cannot be relied upon by the appellant Company, which is domiciled in Oran (Algeria).

"The Franco-Swiss Treaty of 1869 takes account of nationality, and is applicable to bodies corporate. However, Article 13 of that Treaty exempts French nationals before Swiss courts of such charges only as are not payable by Swiss nationals. Swiss nationals resident abroad are liable to give security for costs. Accordingly, Article 13 does not exempt the appellant Company from giving security for costs, even if it were to be assumed that it has French nationality."

[Report: *Arrêts du Tribunal fédéral Suisse*, vol. 80 (1954), II, p. 94.]

Aliens—Treatment of—Treaty Providing for National Treatment of Aliens—Conflicting Municipal Law—Whether Judiciary or Executive Competent to Resolve Conflict—The Law of France.

See p. 281 (*Ministère Public* v. *Carillo-Frontello*).

Aliens—Treatment of—Geneva Convention Relating to the Status of Refugees, 1951—Franco-Roumanian Treaty, 1930—Whether Judiciary or Executive Competent to Interpret Treaty—Roumanian National Trading in France.

See p. 284 (*Ministère Public* v. *G. and Another*).

Aliens—Position of—Liability to Requisitioning—The Law of France.

See p. 277 (*Estades* v. *French Government*).

Aliens—Treatment of—Status of Refugees under Geneva Convention of October 28, 1933.

See p. 1 (*Allahverdi* v. *Lanauze*).

v.—Respect for Property. Expropriation

[*See also* PART IV, JURISDICTION: A, I, Territorial.]

Aliens — Treatment of — Property of Aliens — Legislation for Nationalization of Property of Nationals and Aliens—Payment of Compensation Reserved for Subsequent Law—Whether in Accordance with International Law.

In re RHEIN-MAIN-DONAU AG.

Austria, Constitutional Court. June 24, 1954.

THE FACTS.—After the end of hostilities in the Second World War a power station in Austria, which was owned as to about two-thirds by the German Reich and as to about one-third by the ' Land ' of Bavaria, was taken over by the Soviet army of occupation. By a document referred to as a " contract " and dated July 17, 1953, the Soviet occupation authorities transferred all control over the power station to the Austrian Ministry of Transport. Subsequently, in pursuance of an Austrian Law providing for the nationalization of, *inter alia*, installations for the production and distribution of electricity, the Austrian authorities nationalized part of the land and movable property belonging to the power station, whereupon the trustees of the owners, who had been appointed *ex officio* by the Austrian courts, appealed on behalf of the German Reich against the act of nationalization. They contended, *inter alia* and as far as here material, that the law providing for the nationalization of various enterprises, including power stations, constituted a violation of international law in that it failed to provide for adequate compensation and only promised that the question of compensation would be provided for in a subsequent law, which would deal with the amount of compensation and the mode of payment; and that as Article 9 of the Austrian Constitution provided that the generally recognized rules of international law formed an integral part of the Austrian federal law, the Nationalization Law was unconstitutional and should therefore be declared invalid by the Constitutional Court.

Held: (i) that international law did not require the payment of immediate compensation, and that a nationalization law providing for the assessment and payment of compensation by means of a law to be enacted in the future did not violate international law; (ii) that, though it was true that confiscation, *viz.*, expropriation without payment of compensation, constituted a violation of international law and that the latter formed an integral part of Austrian federal law, it did not form part of Austrian constitutional law, so that even if the Nationalization Law had authorized nationalization without payment of compensation, the Constitutional Court would not be entitled to declare that law invalid.

The Court said: " If the appellants further contend, in order to prove the unconstitutionality of the Nationalization Law, that *vis-à-vis* an alien an expropriation can only be decreed, according to generally recognized rules of international law, against payment of adequate compensation, and that the Nationalization Law merely promises such compensation in the future, then this argument can be countered by saying that—although a confiscation without payment of compensation is regarded, *vis-à-vis* aliens, as inadmissible by the doctrine and practice of international law, and that this is one of those generally recognized rules of international law which Article 9 of the Constitution regards as forming an integral part of federal law—these rules have been incorporated, not as federal *constitutional* law, but as ordinary federal law. Nor does Article 145 of the Nationalization Law, which merely lays down a programme for the future, elevate these rules to the status of *constitutional* rules. Therefore, even if the Nationalization Law were to conflict with these rules [of international law], this fact would not result in its unconstitutionality. Moreover, we cannot call this Law confiscatory, notwithstanding the fact that the special statute foreshadowed in Article 2 has not yet been enacted. In this context this Court may content itself with pointing out that international law does not require the payment of immediate compensation. Therefore, the unconstitutionality of the Nationalization Law cannot successfully be contended for even from the point of view of international law. It follows from the foregoing that the decision under appeal cannot be said to violate the constitutionally guaranteed right of private property."

[Report: Vf GH, 19 (1954), p. 168.]

III.—Expulsion of Aliens

i—Right of Expulsion

Aliens—Expulsion of—For Membership in the Communist Party—Scope of Power to Expel—Requirement of Due Process of Law—The Law of the United States of America.

GALVAN *v.* PRESS, OFFICER IN CHARGE, IMMIGRATION AND NATURALIZATION SERVICE.

United States, Court of Appeals, Ninth Circuit. January 9, 1953.
Supreme Court. May 24, 1954.

(Warren C.J.; Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark and Minton JJ.)

THE FACTS.—Galvan, an alien of Mexican birth, first entered the United States in 1918 and thereafter resided in that country with only occasional brief visits to his native land. In the course of two questionings by the Immigration and Naturalization Service in March 1948, he indicated that he had been a member of the Communist Party from 1944 to 1946. In March 1949, he was served with a deportation warrant, and a preliminary deportation hearing was held to acquaint him with the charges against him, namely, that after entry he had become a member of an organization which advocated the violent overthrow of the United States Government and of an organization which distributed material so advocating. In December 1950, he had a *de novo* hearing. Shortly after the hearing began, the Examining Officer lodged the additional charge against Galvan that after entry he had been a member of the Communist Party, membership in which had become a specific ground for deportation by the Internal Security Act of 1950, 64 Stat. 987, 1006, 1008. The evidence against him at this hearing consisted of testimony that he had been elected an officer of an alleged Communist Party unit and his admissions when he was interrogated by the immigration authorities in 1948 that he had been a member of the Party. The Hearing Officer found that Galvan had been a member of the Communist Party from 1944 to 1946 and ordered him to be deported on that ground. The Hearing Officer's decision was adopted by the Assistant Commissioner, and an appeal was dismissed by the Board of Immigration Appeals. A petition for a writ of habeas corpus was denied by the District Court, and the petitioner appealed.

Held (by the Court of Appeals): that the judgment of the District Court must be affirmed. Congress, in enacting the Internal Security Act of 1950, was validily exercising its plenary power to provide for the expulsion or deportation of aliens. [Report: 201 F. 2d 302.]

The petitioner thereupon petitioned for *certiorari* to the Supreme Court on the ground that the Internal Security Act permitted the deportation of aliens only if they had joined the Communist Party with full appreciation of its purposes and programme, that he had not been fully conscious of its advocacy of violence when he had joined, and that the Act was unconstitutional as applied to him. *Certiorari* was granted.

Held (by the Supreme Court, *per* Frankfurter J.): that the judgment of the Court below must be affirmed. The Internal Security Act of 1950 as applied to the petitioner was constitutional, even though he might not have been aware of the Party's advocacy of violent overthrow of the Government. Congress had broad powers over the admission and deportation of aliens. While the procedural safeguards of due process must be observed in the deportation of aliens, the formulation of policies regarding the right of aliens to remain in the United States was entrusted exclusively to Congress.

The Court said: " Petitioner's contention that there was not sufficient evidence to support the deportation order brings into question the scope of the word ' member ' as used by Congress in the enactment of 1950, whereby it required deportation of any alien who at the time of entering the United States, or at any time thereafter, was a ' member ' of the Communist Party.[1] We are urged to construe the Act as providing for the deportation only of those aliens who joined the Communist Party fully conscious of its advocacy of violence, and who, by so joining, thereby committed themselves to this violent purpose. [The Court here examined the legislative history of the Internal Security Act of 1950.]

" It must be concluded, therefore, that support, or even demonstrated knowledge, of the Communist Party's advocacy of violence was not intended to be a prerequisite to deportation. It is enough that the alien joined the Party, aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization, and that he did so of his own free will. A fair reading of the legislation requires that this scope be given to what Congress enacted in 1950, however severe the consequences and whatever view one may have of the wisdom of the means which Congress employed to meet its desired end.

" On this basis, the Hearing Officer's finding that petitioner here was a ' member ' of the Communist Party must be sustained. Petitioner does not claim that he joined the Party ' accidentally, artificially, or unconsciously in appearance only,' to use the words in Senator McCarran's memorandum. The two points on which he bases his defense against the deportation order are, first, that he did not join the Party at all, and that if he did join, he was unaware of the Party's true purposes and program. The evidence which must have been believed and relied upon for the Hearing Officer's finding that petitioner was a ' member ' is that petitioner was asked to join the Party by a man he assumed to be an organizer, that he attended a number of meetings and that he did not apply for citizenship because he feared his Party membership would become known to the authorities. In addition, on the basis of Mrs. Meza's testimony, the Hearing Officer was entitled to conclude that petitioner had been active in the Spanish Speaking Club, and, indeed, one of its officers. Certainly there was sufficient evidence to support a finding of membership. And even if petitioner was unaware of the Party's advocacy of violence, as he attempted to prove, the record does not show a relationship to the Party so nominal as not to make him a ' member ' within the terms of the Act.

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[1] Section 22 of the Internal Security Act of 1950 provides that the Attorney-General shall take into custody and deport any alien " who was at the time of entering the United States, or has been at any time thereafter, . . . a member of any one of the classes of aliens enumerated in section 1 (2) of this Act. . . ."

Subparagraph (C) of § 1 (2) lists " Aliens who are members of or affiliated with (i) the Communist Party of the United States. . . ." The substance of this provision was incorporated in the Immigration and Nationality Act of 1952, 66 Stat. 163, 205, 8 U. S. C. § 1251 (a) (6) (C).

" This brings us to petitioner's constitutional attack on the statute. *Harisiades* v. *Shaughnessy*, 342 U. S. 580,[1] sustained the constitutionality of the Alien Registration Act of 1940. 54 Stat. 670. That Act made membership in an organization which advocates the overthrow of the Government of the United States by force or violence a ground for deportation, notwithstanding that membership in such organization had terminated before enactment of the Statute. Under the 1940 Act, it was necessary to prove in each case, where membership in the Communist Party was made the basis of deportation, that the Party did, in fact, advocate the violent overthrow of the Government. The Internal Security Act of 1950 dispensed with the need for such proof. On the basis of extensive investigation Congress made many findings, including that in § 2 (1) of the Act that the ' Communist movement . . . is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship,' and made present or former membership in the Communist Party, in and of itself, a ground for deportation. Certainly, we cannot say that this classification by Congress is so baseless as to be violative of due process and therefore beyond the power of Congress.

" In this respect—the dispensation with proof of the character of the Communist Party—the present case goes beyond *Harisiades*. But insofar as petitioner's constitutional claim is based on his ignorance that the Party was committed to violence, the same issue was before the Court with respect to at least one of the aliens in *Harisiades*.

" The power of Congress over the admission of aliens and their right to remain is necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign relations and the national security. Nevertheless, considering what it means to deport an alien who legally became part of the American community, and the extent to which, since he is a ' person,' an alien has the same protection for his life, liberty and property under the Due Process Clause as is afforded to a citizen, deportation without permitting the alien to prove that he was unaware of the Communist Party's advocacy of violence strikes one with a sense of harsh incongruity. If due process bars Congress from enactments that shock the sense of fair play—which is the essence of due process—one is entitled to ask whether it is not beyond the power of Congress to deport an alien who was duped into joining the Communist Party, particularly when his conduct antedated the enactment of the legislation under which his deportation is sought. And this because deportation may, as this Court has said in *Ng Fung Ho* v. *White*,

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[1] See *International Law Reports*, 1952, Case No. 69.]

259 U.S. 276, 284,[1] deprive a man ' of all that makes life worth living '; and, as it has said in *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10, ' deportation is a drastic measure and at times the equivalent of banishment or exile.'

" In light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress, even the war power, see *Hamilton* v. *Kentucky Distilleries Co.*, 251 U.S. 146, 155, much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. And since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the *ex post facto* Clause, even though applicable only to punitive legislation,[2] should be applied to deportation.

" But the slate is not clean. As to the extent of the power of Congress under review, there is not merely ' a page of history,' *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349, but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. *The Japanese Immigrant Case*, 189 U. S. 86, 101; *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 49.[3] But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government. And whatever might have been said at an earlier date for applying the *ex post facto* Clause, it has been the unbroken rule of this Court that it has no application to deportation.

" We are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors, especially those who have been most zealous in protecting civil liberties under the Constitution, and must therefore under our constitutional system recognize congressional power in dealing with aliens, on the basis of which we are unable to find the Act of 1950 unconstitutional. See *Bugajewitz* v. *Adams*, 228 U. S. 585 and *Ng Fung Ho* v. *White*, 259 U. S. 276, 280."[4]

(Reed J. concurred in the judgment of the Court and in the opinion as written, subject to a minor exception. Black and Douglas

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[[1] See *Annual Digest*, 1919–1922, Case No. 180.]

[2] First in *Ogden* v. *Saunders*, 12 Wheat. 213, 271, and again in *Satterlee* v. *Matthewson*, 2 Pet. 380, 681 (appendix), a characteristically persuasive attack was made by Mr. Justice Johnson on the view that the *ex post facto* Clause applies only to prosecutions for crime. The Court, however, has undeviatingly enforced the contrary position, first expressed in *Calder* v. *Bull*, 3 Dall, 386. It would be an unjustifiable reversal to overturn a view of the Constitution so deeply rooted and so consistently adhered to.

[[3] See *International Law Reports*, 1950, Case No. 76.]

[4] See n. 1.

JJ. dissented on the ground that Galvan was being deported for conduct which had terminated six years previously, which at the time was altogether legal, and which he had no reason to anticipate would be a basis for deporting him.)

[Reports: 347 U.S. 522, 398 L.Ed. 911, 74 Sup. Ct. 699.]

NOTE.—Concerning further proceedings in the deportation of Galvan, see *Application of Galvan, infra.*

The principal case is noted in *Alabama Law Review*, 7 (1954), p. 127; *American Bar Association Journal*, 40 (1954), p. 699; *Harvard Law Review*, 68 (1954), p. 116; *Mississippi Law Journal*, 26 (1955), p. 197; *Vanderbilt Law Review*, 8 (1954), p. 121; *Wayne Law Review*, 1 (1955), p. 132.

Deportation on the ground of membership in the Communist Party was also sustained in *Quattrone* v. *Nicholls*, 210 F.2d 513 (1st Cir. 1954), *certiorari* denied, 347 U.S. 976, 98 L.Ed. 1116, 74 Sup.Ct. 786 (1954); *Sigurdson* v. *Landon et Al.*, 215 F.2d. 791 (9th Cir. 1954), *certiorari* denied, 348 U.S. 916, 99 L.Ed. 718, 75 Sup.Ct. 298 (1955); and *Suarez-Seja* v. *Landon*, 124 F.Supp. 871 (S.D.Calif. 1954). Deportation for conviction of a crime involving moral turpitude, committed by a minor prior to his entry into the United States, was held constitutional in *United States ex rel. Circella* v. *Sahli*, 216 F.2d 33 (7th Cir. 1954), *certiorari* denied, 348 U.S. 964, 99 L.Ed. 752, 75 Sup.Ct. 525 (1955).

The discretion of the Attorney General to permit voluntary departure in lieu of deportation is not reviewable except on proof of abuse of, or failure to exercise, his discretion. *United States ex rel. Frangoulis* v. *Shaughnessy*, 210 F.2d 572 (2d Cir. 1954).

In a deportation proceeding the Government has the burden of proving the alienage of the defendant. *United States ex rel. Leong* v. *O'Rourke*, 125 F.Supp. 769 (W.D.Mo. 1954).

Aliens—Expulsion of—Equality of Nationals and Aliens with Respect to Enjoyment of Property Not a Basis for Denying Expulsion—Treaty of Guadalupe Hidalgo, 1848—The Law of the United States of America.

APPLICATION OF GALVAN.

United States, District Court, Southern District, California.
December 30, 1954.

THE FACTS.—Galvan, a national of Mexico, was ordered to be deported from the United States for membership in the Communist Party (see *Galvan* v. *Press, Officer in Charge, Immigration and Naturalization Service, supra*, p. 213). He sought *habeas corpus* on the ground that his deportation was unlawful under Article VIII of the Treaty of Peace, Friendship, Limits, and Settlement between the United States and Mexico, signed at Guadalupe Hidalgo on February 2, 1848 (9 United States Statutes at Large 922, Treaty Series No. 207), which provided:

> "In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it, guaranties equally ample as if the same belonged to citizens of the United States."

The petitioner contended: ". . . it is sought to deport him to the Republic of Mexico in violation of the provisions of the Treaty of Guadalupe Hidalgo of 1848, which said Treaty, by its terms, accords to Mexican Nationals residing in ceded territories by contract or purchase all rights accruing to citizens of the United States. That the State of California is a territory ceded to the United States under said Treaty. That petitioner is the owner of real property in the City of San Diego, State of California and has owned said property for a period longer than nine years. That there is no law requiring the deportation of American or United States citizens. That one of the rights of United States citizenship is to acquire property and to have the use, benefit and enjoyment of such property and to reside thereon."

Held: that the application for the writ must be refused. The Treaty did not preclude the deportation of a national of Mexico to that country. The Court said in part: "We are unable to see anything in this section which places upon the United States the burden of allowing a Mexican alien who has been a member of the Communist Party to remain in this country solely that he may enjoy the occupancy of property within the territory covered by the Treaty of Guadalupe Hidalgo. Whatever concessions given in that historic document by one friendly nation to another which can be read into the Treaty, these are, of course, entitled to judicial obeisance. We find nothing there to warrant the granting of this writ of habeas corpus."

[Report: 127 F. Supp. 392.]

Aliens—Deportation of—Immigrant Convicted of Crime—Service of Deportation Order Without Previous Notice Thereof—Whether Order Invalid through Operation of *audi alteram partem* Rule—The Law of South Africa.

KADER *v.* MINISTER OF THE INTERIOR,

South Africa, Supreme Court, Cape Provincial Division.

(de Villiers J.P.).

March 19, 1954.

THE FACTS.—Kader was born in India at a time when his father was domiciled in the Union of South Africa. The son came to South Africa in 1942 and remained there until 1947. Thereafter he spent two years in India, returning to the Union again in 1949, when he worked in a shop in Cape Town. In 1952, he was convicted of theft and sentenced to a whipping of eight cuts. He appeared before the courts again a year later—this time on two counts of stealing watches and jewellery. He pleaded guilty, and was given the option of a fine or six weeks in gaol with hard labour, as well as a further six weeks' sentence of imprisonment, suspended for two years on condition of good behaviour. Some six months after this event he was served with an order, signed by the Minister of the Interior, in terms of sec. 22 of the Immigration Act, 22 of 1913, as amended by sec. 4 of Act 15 of 1931, deeming him to be an undesirable inhabitant of the Union, and enclosing a warrant for his deportation. On receipt of this, Kader applied to the Cape Provincial Division of the Supreme Court for an order declaring the Minister's deeming order to be irregular and improper, and restraining him from deporting the petitioner. Kader claimed that the deportation order was invalid as he had been given no opportunity to submit representations to the Minister on his own behalf before it was made. He stated that his father had recently died, leaving a considerable estate to be administered by his widow, who was illiterate, and that the interests of the family would suffer heavily if he was sent out of the country. The Minister filed an affidavit in reply, admitting that the petitioner had not been notified of the fact that the deeming order was about to be made, but, in the forty years in which the Immigration Act had been in operation, no such prior notice had ever been served. Furthermore, the Minister said, he had carefully considered representations made to him by the petitioner after the actual deeming order had been served, and had come to the conclusion that they contained nothing that would justify his interfering with the course of the law by revoking the deportation order. The petitioner had a brother who could look after the interests of the father's estate.

Held: that the order against deportation would not be granted. The deeming order made by the Minister was perfectly regular, and he was under no obligation to inform the petitioner of the intended making of such an order.

The Court said: " The crisp point for determination is whether the Minister erred in that he did not, prior to making the deeming order, provide the petitioner with an opportunity for making appropriate representations to him in order to obviate the issue of an order of deportation against him. The proper appreciation of this submission requires a scrutiny of the relevant section of the Act, in terms of which the Minister admittedly acted. The question is whether this section provides any support for the contention of the petitioner. Once it has been proved that a person has been born outside the Union, two requirements, and two only, have to be satisfied before, in terms of section 22, a person may be removed from the Union: (1) there must be a sentence for imprisonment, for, *inter alia*, theft: it is common cause that this requirement has been satisfied; (2) the person concerned must have been deemed by reason of the circumstances of such offence to be an undesirable inhabitant of the Union. Admittedly the Minister has deemed him to be such, and an appropriate order . . . has been issued. What, then, is the proper connotation of the operative words ' by reason of the circumstances of such offence ' ? As a matter of construction, the language is perfectly clear. The sentence of imprisonment followed upon conviction for the offence, and both conviction and sentence stand in the absence of a successful appeal . . . What, then, are the circumstances of the offence to which the Minister is enjoined to apply his mind before deeming the person convicted to be an undesirable inhabitant of the Union ? He would examine the record of the case in question, for the record of the case will disclose the evidence upon which the Crown and the defence respectively, rely . . . Such evidence will fall within the term ' circumstances of the offence '—the manner in which the accused committed the offence, and the motive by which he was prompted, likewise fall within its connotation . . . but . . . the language of the section certainly does not require the Minister, before issuing an order under it, to provide a person falling within its ambit with an opportunity to make representations in advance as to the circumstances of the offence, with the object of inducing him to refrain from exercising the power conferred upon him by the section in question . . . It is common cause that six months elapsed after the sentence of imprisonment was imposed, before the Minister issued his deeming order, and that during that period the petitioner, though in danger of, or at least liable to deportation, took no steps by way of presenting representations on his behalf to the Minister . . .

" It is now contended that even though no such representations were made by the petitioner, it was in law the duty of the Minister to advise him that he intended to consider his case under the provisions of sec. 22, and, in consequence, to invite him to make, or provide him with an opportunity for making, representations to him in order to obviate the application of this section to his case . . . The argument advanced by counsel admittedly rests on the maxim *audi alteram partem* . . . Sec. 22 of Act 22 of 1913, does not either expressly or impliedly require the Minister to notify the person concerned in advance of his intention to consider his case in terms of this section . . . nor is he required to concern himself with any hardship following upon a competent sentence of imprisonment for an offence falling under sec. 22 . . . In the present case the petitioner must be taken to have known the law. He had not only on three occasions been convicted of theft, but had, on one of these occasions, been sentenced to imprisonment. In law he must be accordingly taken to have known that he was liable to deportation if the Minister considered that by reason of the circumstances of the offence, he was an undesirable inhabitant of the Union. He had six months in which to make appropriate representations, and during this period he failed to do so. Had he done so, it is not disputed that the Minister would have considered them. He had had ample opportunity, therefore, of making whatever representations he thought fit, and failure to take advantage of this period of time does not entitle him to contend successfully that the onus was on the Minister to provide him with an opportunity of making representations, prior to taking action under this section . . ."

[Report: 1954 (2) S.A. 516 [C.].]

Aliens—Expulsion of—*Renvoi*—Privileged Aliens—Grounds for Expulsion—Jehovah's Witness—Propaganda against Military Service.

HOLMES *v.* BELGIAN STATE (MINISTER OF JUSTICE).

Belgium, Conseil d'État. January 29, 1954.

THE FACTS.—On March 25, 1953, a ministerial order was made by the Minister of Justice enjoining the complainant to leave Belgian territory and not to re-enter it without special authorization. The reason for the order was stated to be that " the presence of the alien concerned, who does not have a permit to settle in the country, is dangerous for its safety ". The complainant sought to obtain the annulment of that order. In support of the complaint it was contended, first, that the complainant, who was married to a Belgian woman and had been resident in Belgium for more than five years, was a privileged alien who could be expelled only by a Royal order made on the advice of a special consultative committee after consideration in full Cabinet. It was contended, secondly, that the order was unfounded. In reply it was contended, first, that only aliens in possession of a permit to settle in the country were privileged in the matter of expulsion, and, secondly, that the order complained of was well-founded by reference to the fact that the complainant, as Chairman of the non-profit-making Watch Tower Bible and Tract Society (Jehovah's Witnesses), propagated the doctrine of conscientious objection to military service, which constituted a danger to the safety of the country. The complainant denied that the Society advocated conscientious objection.

Held: that the complaint must be dismissed. Only aliens in possession of a permit to settle in the country were privileged in the matter of expulsion. In considering that the presence of an alien actively participating in an organization distributing pamphlets liable to provoke conscientious objection to military service was dangerous to the safety of the country, the Minister of Justice remained within the limits of his discretionary power of appreciation.

The Court said: "Article 2 of the Law of March 28, 1952, draws a distinction between aliens authorized to enter or reside in Belgium and aliens who have obtained a permit from the Minister of Justice to settle in the country. While only the King can, under Article 4 of that Law, expel aliens who have received the permit to settle in the country, the Minister of Justice is competent, under Article 3 of the Law, to send out of the country (*renvoyer*) aliens who do not observe the conditions attached to the authorization they have received, or whose presence he considers harmful or dangerous to public order or the safety or the economy of the country. The order complained of in this case is one of ' renvoi ', which fell within the competence of the Minister of Justice.

" Article 5 of the Law gives special guarantees to aliens called privileged, and in particular to aliens who have been continually resident in the country for more than five years and who have married Belgian women, namely, the advice of a special consultative committee and, where appropriate, prior consideration in full Cabinet. However, that advice and consideration are required under that Article prior to any ' expulsion order '. The term ' expulsion order ' does not include the ministerial act of ' renvoi ' . . . The Legislature in 1952, considering the ' increase in the foreign population in Belgium and the international situation ', did not intend to give these guarantees to aliens other than those who had obtained a permit to settle in the country . . .

" It appears from documents submitted to the Court, which are pamphlets edited by the Watch Tower Society, that various passages therein, if they do not directly invite Belgian nationals to refuse to perform military service, are liable to provoke their resistance to the laws by refusal to perform military service which is compulsory under Belgian law. That propaganda takes no account of special conditions in Belgium and of the duties of its citizens. It is not necessary to decide whether conscientious objection is an essential principle or doctrine of the teachings of the Watch Tower Society, or what the moral value of such a doctrine is. It suffices to find that in considering that the presence of an alien actively participating in an organization distributing such pamphlets without concerning himself with the consequences of such distribution was dangerous to the safety of the country, the Minister did not act in the absence of all circumstances liable to justify a measure of ' renvoi ', and remained within the limits of his discretionary power of appreciation.

" The complainant contends that the order complained of constitutes an interference with the freedom of religion guaranteed by Article 14 of the Constitution. The purpose of the order complained of is not to prevent the complainant from believing in or professing his religion, or to prohibit wholly or partly the exercise of a religion or to intervene in its organization, but to enjoin the complainant to leave Belgian territory and not to re-enter it. That order is based not on considerations of religious doctrine or morality, but on reasons concerning the safety of the country. Article 128 of the Constitution, while granting aliens on Belgian territory the benefit of the general protection there given to persons and to property, provides that exceptions to that principle may be laid down by law. Article 3 of the Law of March 28, 1952, concerning aliens, by authorizing the Minister of Justice to send out of the country aliens whose presence he considers to be dangerous or harmful to the public order, the safety or the economy of the country, restricts, in conformity with Article 128 of the Constitution, the exercise by aliens on Belgian territory of certain rights granted to Belgian citizens, for instance, by Article 14 of the Constitution."

[Report: *Pasicrisie belge*, 1955, IV, p. 42.]

Aliens—Expulsion of—Competent Authority—*Renvoi*—Privileged Aliens.

MARK *v.* BELGIAN STATE (MINISTER OF JUSTICE).

Belgium, Conseil d'État. May 14, 1954.

THE FACTS.—The complainant was born in Antwerp, Belgium, of foreign parents, In 1929, at the age of 21, he acquired Belgian nationality by option. In 1948 he acquired American nationality by naturalization. On January 21, 1953, the Belgian Minister of Justice made an order that the complainant must leave Belgian territory and not re-enter it, on the ground that his presence was considered harmful for public order. The complainant now sought to obtain the annulment of that order. It was contended on his behalf that, having resided in Belgium for more than twenty years, he was a privileged alien who could be expelled only by a Royal order made on the advice of a special consultative committee. It was further contended that, even if it were maintained that only aliens in possession of a permit to settle in the county (which was not the case of the complainant) were privileged in the matter of expulsion, the complainant must be assimilated to such an alien by virtue of the fact that he had resided in Belgium for ten years as a Belgian national, in which capacity he did not require a permit to settle.

Held: that the complaint must be dismissed. Only aliens in possession of a permit to settle in the country were privileged in the matter of expulsion. The complainant could not invoke the rights deriving from Belgian nationality, since he had voluntarily acquired another nationality.

The Court said: " Article 3 of the Law of March 28, 1952, gives the Minister the power to send out of the country (*renvoyer*) any alien whose presence he considers to be dangerous or harmful to the public order, the safety or the economy of the country. That power must, according to the same Article, be distinguished from the power to reconduct an alien to the frontier, and includes the right to forbid the alien to re-enter Belgian territory. Article 4 reserves to the King the right to expel an alien who has obtained a permit to settle in the country, should he consider the presence of that alien dangerous or harmful to the public order or the safety of the country. It appears from the foregoing that the Minister is competent to compel an alien who does not have a permit to settle in the country to leave it, if the presence of that alien is considered harmful to public order.

" The complainant cannot rely on the fact that before acquiring American nationality he spent more than ten years in Belgium as a Belgian national, for the purpose of concluding that he must be assimilated to an alien who has obtained the permit to settle in the country. Undoubtedly, an alien who acquires Belgian nationality, by option or otherwise, cannot be expelled or sent out of the country, and is not required to obtain a permit to settle. But these advantages derive from Belgian nationality and cannot be claimed by a person who has voluntarily acquired another nationality at the time of the order of expulsion or of *renvoi*.

" Nor can the complainant rely on the fact that he resided in Belgium for more than ten years, for the purpose of his contention that only a Royal order, made on the advice of a consultative committee, could compel him to leave the country and forbid him to re-enter it. Article 5 cannot be isolated from the rest of the Law. It presupposes for its application that the alien to be expelled has a permit to settle in the country or is a refugee at the time when he is ordered to leave the country. It is intended to take into account the links with the country which prolonged residence leads one to assume; these links do not exist where the alien, after residence in Belgium, went abroad and acquired a foreign nationality."

[Report: *Pasicrisie belge*, 1955, IV, p. 119.]

NOTE.—See also *Dientel and Goetz* v. *Belgian State* (*Minister of Justice*), decided by the Conseil d'État on April 30, 1954 (*Pasicrisie belge*, 1955, IV, p. 109), and *Groesz* v. *Belgian State* (*Minister of Justice*), decided by the same Court on July 14, 1954 (*ibid.*, p. 153).

ii.—Procedure of Expulsion

Aliens—Expulsion of—Denial of Asylum—Discretionary Powers of Executive Branch of Government—Deportation to Territory Controlled by Unrecognized Government—The Law of the United States of America.

UNITED STATES *ex rel.* LEONG CHOY MOON *v.* SHAUGHNESSY.

United States, Court of Appeals, Second Circuit. December 23, 1954.

THE FACTS.—Leong Choy Moon, a national of China, was an admittedly deportable alien. He refused to execute the documents which would have permitted him to be deported to territory controlled by the Nationalist Government of China. A warrant of deportation was issued directing his deportation to the mainland of China. He thereupon applied to the Attorney-General for a stay of deportation on the ground that he would be subjected to physical persecution if deported to territory controlled by the Communist Government of China. The application was made under Section 243 (*h*) of the Immigration and Nationality Act, 66 Stat. 214, 8 U.S.C. § 1253 (*h*), which provides:

> " The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason."

The application was refused. There followed the issue of a writ of habeas corpus, which was dismissed by the District Court without opinion. The petitioner appealed on the ground that the administrative determination that he would not be subject to physical persecution was arbitrary and capricious, and that he could not be deported to a " country " which was not under the control of a Government recognized by the United States.

On appeal,

Held: that the order of the District Court must be affirmed, but the mandate stayed for 90 days to permit an attempt to secure the co-operation of the appellant in bringing about his deportation to Formosa. The question of whether deportation should be withheld rested solely with the Attorney-General or his delegate. The statutory enumeration of various categories of " country " to which he might be deported did not preclude his deportation to a " country " controlled by a Government not recognized by the United States.

The Court said: " In the field of immigration and nationality Congress has vested the executive branch of the Government with wide discretionary powers, and the scope of judicial review is closely circumscribed. In particular, we have held that under § 243 (h) the question of whether deportation should be withheld because an alien fears persecution rests solely with the Attorney General or his delegate. *United States ex rel. Dolenz* v. *Shaughnessy*, 2 Cir., 1953, 206 F.2d 392.[1] We there pointed out that whereas the comparable section in the predecessor statute, § 23, Internal Security Act of 1950, 64 Stat. 1010, required withholding the deportation of any alien to any country in which the Attorney General ' shall find ' that such alien would be subjected to physical persecution, present § 243 (h) modified that provision so as simply to authorize the Attorney General to withhold deportation to any country in which ' in his opinion ' the alien would be subjected to such persecution. We found in this change of language a clear indication that Congress intended

[[1] See *International Law Reports*, 1953, p. 330.]

the withholding of deportation in such circumstances to rest ' wholly in the administrative judgment and " opinion " of the Attorney General or his delegate.' *United States ex rel. Dolenz* v. *Shaughnessy, supra*, 206 F.2d at page 394. This is not to say that the courts may not intervene when an alien has been denied appropriate procedural due process or a fair consideration of his application. But we are presented with nothing of that kind here. In accordance with § 243 (a) of the Act this alien was given an opportunity, and failed, to elect a country for deportation that might be willing to accept him. And he declined to cooperate towards accomplishing his deportation to Formosa or other territory controlled by the Republic of China by refusing to execute such papers as were required by the Nationalist Chinese Government for admission to territory over which it exercises sovereignty. He was given full opportunity to testify and present evidence in support of his application, and there is nothing to indicate that the representative of the Attorney General did not reach his decision solely on what he believed to be the merits of the alien's application. In these circumstances we may not substitute our judgment for that of the Attorney General's representative. *United States ex rel. Dolenz* v. *Shaughnessy, supra.*

" The appellant also contends that under the Immigration and Nationality Act of 1952 he may not be deported to Communist China. We cannot agree. § 243 (a) of the Act, 8 U.S.C.A. § 1253 (a), provides both for the various countries to which deportation may be had and for the order of their selection. *First*, deportation shall be to any country of the alien's choice (with certain exceptions) which is willing to accept him. Concededly the alien here refused to make a choice. *Second*, deportation shall then be to any country of which the alien is a subject, national or citizen, which is willing to accept him. This provision has not been violated here. For if, as the appellant contends, 'country' in this provision means a territory under the control of a government recognized by the United States, and thus, in this instance, deportation to China means deportation to Formosa or other territories under the control of the Republic of China, this action was not required, because the alien has refused to file the application forms required by the Chinese Nationalist Government as a condition of its willingness to accept immigrants. On the other hand, if this provision prescribes deportation to Communist controlled territory, its requirement has been satisfied, since the Attorney General acting under the provisions of the statute next mentioned has elected deportation to that territory. *Third*, deportation may finally be had, at the election of the Attorney General, to any of a number of countries, principally countries with which the alien has had some contact.[1] Under these provisions, deportation of this alien to the China mainland was authorized by one or more of the following subdivisions:

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[1] Failing deportation to any of the countries referred to in " First " and " Second " above, § 243 (a) provides that " deportation shall be directed by the

> ' (3) to the country in which he [the alien] was born; (4) to the country in which the place of his birth is situated at the time he is ordered deported; (5) to any country in which he resided prior to entering the country from which he entered the United States; . . . or (7) . . . to any country which is willing to accept such alien into its territory ',

assuming, of course, that it turns out that the Chinese communist authorities are willing to accept this alien. Concededly, appellant was born and had resided on the mainland of China prior to his entry into the United States.

" Appellant argues, however, that no matter what provision he is deported under, he can only be deported to a ' country.' And ' country,' he says, in these subdivisions and elsewhere in the statute can mean only a country recognized by the United States, citing *Delany* v. *Moraitis*, 4 Cir., 1943, 136 F.2d 129, 130,[1] for the statute contemplates exchanges of communications between such ' countries ' and the United States, and no such exchanges can normally be had with countries we do not recognize.

" We cannot agree that the word ' country ' in § 243 (a) must be so limited. While it is true that parts of the statute contemplate communication with other countries, that is a far cry from saying that if communication is impossible, the other nation is not to be regarded as a ' country.' Such an interpretation would be an unnecessary departure from the ordinary meaning of the term. Indeed the reference in subdivision (7) of § 243 (a) to ' any of the foregoing *places* or countries ', clearly indicates that ' country ' is not necessarily to be given the limited meaning claimed by the appellant, and we think this is certainly so as to subdivisions (3), (4), (5) and (7). Nor is appellant's interpretation warranted by the Moraitis case. There an alien was to be deported to ' the country whence [he] came '. That would have normally meant that he would have been deported to Greece, but since Greece was then occupied by Germany, the immigration authorities had proposed to deliver the alien into the custody of the Greek government-in-exile in England. In holding this proposal permissible, the court did not deal with the question whether the alien might have been sent to the occupied area, if the

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Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth either—(1) to the country from which such alien last entered the United States; (2) to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory; (3) to the country in which he was born; (4) to the country in which the place of his birth is situated at the time he is ordered deported; (5) to any country in which he resided prior to entering the country from which he entered the United States; (6) to the country which had sovereignty over the birthplace of the alien at the time of his birth; or (7) if deportation to any of the foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory."

[1] See *Annual Digest*, 1941–1942, Case No. 96.]

authorities had wished and been able to send him there. Moraitis is therefore not apposite to this case.

"We conclude, therefore, that the appellant was properly deportable to the mainland of China. Nevertheless, taking judicial notice of the hazardous conditions in that area of the world, and in light of the expressed willingness of the Immigration authorities to deport this alien to Formosa if it can be accomplished, we are constrained to give the appellant another opportunity to cooperate with the Immigration authorities in bringing about his deportation to Formosa or any other territory under the control of the Chinese Nationalist Government . . ."

[Report: 218 F.2d 316.]

NOTE.—In *Brownell* v. *Gutnayer*, 212 F.2d 462 (D.C. Cir. 1954), the Attorney-General had denied adjustment of immigration status to Gutnayer, who had entered the United States in 1946 as an accredited official of a foreign Government, notwithstanding the provisions of Section 4 of the Displaced Persons Act, 1948, 62 Stat. 1011, as amended, 50 U.S.C. App. § 1953, that a "displaced person" who "lawfully entered the United States as a non-immigrant" might apply for such an adjustment of his status and that "if the Attorney-General shall, upon consideration of all the facts and circumstances of the case, determine that such alien has been of good moral character for the preceding five years and that such alien is qualified under the provisions of this section, the Attorney General shall report to the Congress all of the pertinent facts in the case." The Attorney-General contended that Gutnayer had entered the United States unlawfully in that at the time of his entry he intended to remain permanently. The Court said:

> "Appellee's intention to remain permanently in the United States did not make it unlawful for him to enter the United States 'as a non-immigrant' on being duly admitted as an accredited official of a foreign government under § 3 of the Immigration Act of 1924, 43 Stat. 154, as then amended, 54 Stat. 711. Cf. *United States* v. *Prince Line*, 2 Cir., 1951, 189 F.2d 386. And the Attorney General's discretion under the Displaced Persons Act is subject to judicial review for plain error of law. Cf. *McGrath* v. *Kristensen*, 340 U.S. 162, 71 S.Ct. 224, 95 L.Ed. 173[1]; *United States ex rel. Accardi* [*sic*] v. *Shaughnessy*, 347 U.S. 260, 74 S.Ct. 499.[2] However, we think the final clause of the appealed judgment should provide only that the plaintiff is not to be denied adjustment of status as a displaced person upon the theory that an intention to remain permanently in the United States made his entry unlawful."

Aliens—Expulsion of—Prohibited Immigrants—Arrest Pending Deportation—Failure of Authorities to Give Notice of Grounds for Arrest to Person Detained—Whether This Renders Arrest Unlawful—The Law of South Africa.

KAZEE *v.* PRINCIPAL IMMIGRATION OFFICER AND ANOTHER.

South Africa, Supreme Court, Witwatersrand Local Divisions.

(Blackwell J.)

March 3, 1954.

THE FACTS.—Abdul Aziz Kazee, an Indian by birth, was resident in the Cape Province of the Union of South Africa, but never acquired

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[1 See *International Law Reports*, 1950, Case No. 67.] [2 *Ibid.*, 1953, p. 357.]

a domicil there as he had only been admitted on a condonation permit. In 1907, while in India, he had married a certain Hafsabibi, by Moslem rights; but she remained behind when he returned to South Africa. Kazee, it appears, then married another woman at the Cape, and had children by her. On November 1, 1953, Hafsabibi arrived in the Union by air from India. She carried no papers entitling her to enter the country, and the Chief Immigration Officer of Johannesburg, after making enquiries, told her verbally that, as her husband had another wife alive in the Cape, she was a prohibited immigrant and must leave South Africa by the first available plane. Hafsabibi obtained a reservation on a flight to India on November 14. On November 9 she informed the authorities of this fact, and was immediately taken into custody by the police, to be held until the time came for her departure. At this juncture her husband took legal advice, and was informed that the arrest of his wife was probably illegal, as she had not been served, in terms of sec. 2 (5) of the Immigrants Regulation Act (22 of 1913), with any formal notice informing her that she was classified by the Principal Immigration Officer as a prohibited immigrant, but might appeal against this decision to the Immigration Appeal Board. Such notice was only served on her on November 12, the day on which Dowling J., in pursuance of an urgent application made to him by Kazee, issued a Court order directing the respondents to show cause why the applicant's wife should not be released from custody until such time as her right to remain in the Union had been determined by the proper forum. In the face of this she was released, pending an appeal to the Immigration Board against her classification as a prohibited immigrant. The problem now arose as to which party should pay the costs of the application to Dowling J., this depending, in turn, on whether or not the original arrest was illegal. The present proceedings took the form of a determination of that question.

Held: that the arrest was illegal. The authorities concerned had exceeded their powers in detaining Hafsabibi without immediately serving on her the notice required by the Immigration Act.

The Court said: " The case for the applicant is that the immigration authorities, having arrested Hafsabibi on November 9, lay under a duty forthwith to serve upon her a notice in terms of sec. 2 (5) of the Immigrants Regulation Act, 22 of 1913. The relevant portion of this sub-section reads as follows:

> ' . . . when any person is detained, restricted, or arrested as a prohibited immigrant, notice of that fact and the grounds of refusal, detention, retriction, or arrest shall be given by such officer in writing to the said person . . . '

Then in sub-sec. (6) it is provided that, '. . . such person may appeal to the Board . . . ', and in sub-sec. (7) it is provided that an appeal may not be heard by a Board ' . . . unless notice thereof in the prescribed form has been given to the immigration officer by or on behalf of the person concerned within three days after the refusal, detention, restriction, or arrest aforesaid . . ."

" It will be noticed that sub-sec. (7) is peremptory in its terms and requires a notice in prescribed form to be given within three days after the refusal, detention, restriction, or arrest. In other words, the three-day period runs not from the date of service of the notice required by sub-sec. (5) but from the date of the detention or arrest. This makes it clear, so it seems to me, that the notice must reasonably coincide with such detention or arrest. If this were not so, then, as in the present case, a person affected, on receiving a notice, might find himself out of time so far as an appeal was concerned . . . It seems clear to me that the Legislature, in passing sub-secs. (5), (6) and (7) at the same time, in the same Act, intended the notice to be given forthwith . . . Sec. 19 of the Act confers upon the immigration officers extensive and no doubt necessary powers [to declare a person a prohibited immigrant]. To safeguard the subject against the harsh or improper use of these powers, the safeguards created by sub-secs. (5), (6) and (7) of sec. 2 have been provided and the officers concerned may exercise their powers subject only to the proper observance in favour of the subject of these safeguards. If they fail to observe these safeguards, then they are acting illegally and without authority. It was the duty of the first respondent, in my opinion, on November 9, to serve upon Hafsabibi the required notice. This was not done until November 12, when the three days had virtually expired. In my opinion the first respondent had no right to order the detention of Hafsabibi save upon the condition that she was immediately to be served with the prescribed notice and her detention therefore from November 9 onwards until the service of a proper notice was illegal. Applicant being unaware of the steps taken on November 12 to serve the required notice on Hafsabibi was justified in law in preparing and presenting the petition for his wife's release. I do not think I can stress too strongly the duty which lies on officials entrusted with the administration of the immigration laws, often drastic and harsh in their operation, of observing strictly and punctiliously the safeguards created by the Act . . ."

[Report: 1954 (3) S.A. 759 [W].]

D—EXTRADITION

II.—Extradition of Nationals

Extradition—Conditions of—Extradition of Nationals—Request for Temporary Extradition of National of Requesting Country—Simultaneous Undertaking by Requesting Country to Return the Accused to Requested Country—Constitution of Requesting Country Prohibiting Extradition of Nationals—Whether Undertaking to Return the Accused Violates that Prohibition—The Law of Germany.

EXTRADITION OF GERMAN NATIONAL CASE.

German Federal Republic, Federal Supreme Court. March 3, 1954.

THE FACTS.—The Federal Republic of Germany requested the so-called " temporary extradition " of a German national from Italy, in accordance with the relevant provision of the German-Italian Extradition Treaty of June 12, 1942. The Italian authorities insisted, as they were entitled to do in accordance with the said Treaty, that the person temporarily extradited should be returned to Italy in due course, and the German authorities gave an undertaking to this effect. The German national concerned objected to this undertaking being given, and contended that it was contrary to Article 16 (2) of the Constitution of the Federal Republic of Germany which provides that " no German shall be extradited to a foreign country ".

Held: that the objection was ill-founded because an undertaking to return a German national to a foreign country which has agreed to his temporary extradition to the Federal Republic of Germany was not an undertaking to " extradite " that person.

The Court said: " The return of a person [to the country which has ' temporarily ' extradited him] differs in essence from extradition. Extradition within the wider meaning of Article 16 (2) of the Constitution is the delivery of a person, at the request of the competent foreign authority, from the German to a foreign jurisdiction. The extraditing State surrenders to the foreign State its power over the person extradited. Extradition therefore presupposes that the extraditing State possesses unlimited power over the person to be extradited but is prepared to surrender that power. This applies equally to temporary extradition, which may be regarded as constituting a special case of extradition. Whereas, however, in the case of definitive extradition power over the person extradited is surrendered to the requesting State without any limitation, *viz.*, also without limitation in point of time, in the case of temporary extradition the requested State only surrenders part of its power to the requesting State, and then only for a limited period of time.

The requested State is still in a position to refuse definitive extradition in the event of weighty objections subsequently being felt against it, such as the discovery that the principle of speciality has been disregarded in criminal proceedings.

"The return of a person presents only an outward similarity to his temporary or definitive extradition, namely, to the extent that the returning State also surrenders the power which it has been exercising. There are, however, fundamental distinctions between the delivery of a person by way of extradition and his delivery by way of return. These are evident from a comparison between the respective positions in which the two States find themselves before and after the extradition, and before and after the return of a person. Extradition enables the requesting State to exercise for the first time jurisdiction over the person extradited. Extradition gives to the requesting State the assistance which it needs in order to exercise its jurisdiction. The rule that a State's own nationals shall not be extradited is based on the idea that the home State should not lend its assistance so as to enable another State to exercise jurisdiction over its nationals when that other State is unable to do so in the exercise of its unaided power. Where, on the other hand, we are concerned with the return of a State's own national to another State, the latter can exercise its jurisdiction without having to invoke foreign assistance and without being prevented from doing so by the extradited person's home State which requests the temporary extradition. While extradition confers upon the requesting State a position which hitherto it has not enjoyed, the return of a person merely re-establishes the position as it existed before the temporary extradition; it again puts the extraditing State into the position in which it was originally and which it voluntarily surrendered temporarily to the requesting State. Nor does the return of the person extradited put the latter in a worse legal position than he was in before his temporary extradition.

"The different situations in which the two States find themselves before and after the temporary extradition, and before and after the return, of a person, are apparent also if we compare the power which is conferred upon a foreign State where a person is temporarily extradited, with that which is conferred upon it where a person is returned. In returning a person the returning State surrenders a lesser degree of power than does the requested State in granting temporary extradition, because the returning State, by means of the temporary extradition, was granted only part of the power exercised by the extraditing State. While the requested State can frequently demand the handing over of a person temporarily extradited, or can at least expect that person's return within a foreseeable period of time, whereafter it can again exercise jurisdiction over him, the returning State loses all its power over the returned person and must bide its time until the foreign State carries out the definitive extradition. The returning State is not able to press its claim with anything like the force with which the requested State can press its claim for the return of the person concerned. That part of the power which is conferred upon the requesting State is limited by a duty to return the person concerned, and the requesting State is under a duty to keep that person in custody for the requested State, even if the court of the requesting State has acquitted that person. By virtue of these obligations the requesting State, if it is the home State of the person concerned, cannot grant him greater protection than he was entitled to receive before his temporary extradition, *viz.*, while he was in the territory of the foreign State. The links between the person extradited and the State to which he has been temporarily extradited are considerably weaker than those between that person and the extraditing State. Therefore, the concept of protection which forms the basis of the rule prohibiting the extradition of nationals, while precluding temporary extradition, does not preclude return to the requested State."

[Reports: BGHSt, 5 (1954), p. 396; NJW, 7 (1954), p. 1050.]

III.—Conditions of Extradition. Extraditable Crimes

Extradition—Conditions of—Double Criminality—Crimes Not Included in Extradition Treaty—Offences Committed on Territory of Extraditing State.

UNITED STATES OF AMERICA *v.* LINK AND GREEN.

Canada, Superior Court of Quebec. December 17, 1954.
(Scott A.J.C.)

THE FACTS.—On the basis of indictments in the State of Michigan, the United States applied for the extradition of Link and Green. The indictments charged them with obtaining by false pretences, and forgery, inducing persons residing in Michigan to buy shares in certain companies. The accused conducted their scheme from Montreal by means of postal and telephone services: at no time were they in Michigan or elsewhere in the United States.

Held: that the application for extradition must be dismissed. For an extradition application to be granted to surrender a fugitive for trial in a foreign jurisdiction, the conduct charged as an offence must be punishable criminally both by the laws of that foreign jurisdiction and of Canada, and must also come within the provisions of the relevant Extradition Treaty or Convention.

The Court said: " Before an extradition application can be granted it must be shown that the crime with which the accused is charged in the foreign country is a crime which is also punishable criminally by the law of Canada.

" In this extradition application, in addition to what is known as ' double criminality ', the offence charged must also come within the provisions of a Treaty or Convention with the foreign country asking for extradition.

" It now becomes necessary to state that the applicant did not attempt to make any proof that forgery, false pretences, defrauding the public or appropriating money or property for the benefit of the accused were offences under the law of the State of Michigan, although they are criminal offences under the Canadian Criminal Code. Thus as far as this record is concerned there are no such crimes under the State law of Michigan.

" We now turn to the Supplementary Convention between Canada and the United States of America executed on October 26, 1951. Article I reads as follows: The enumeration number 11 in Article I of the Supplementary Extradition Convention signed on December 13, 1900, between the United States of America and Her Britannic Majesty, is hereby amended to read as follows: 11A. Obtaining property, money or valuable securities by false pretences or by defrauding the public or any person by deceit or falsehood or other fraudulent means, whether such deceit or falsehood or any fraudulent means would or would not amount to a false pretence. 11B. Making use of the mails in connection with schemes devised or intended to deceive or defraud the public or for the purpose of obtaining money under false pretences.

" By s. 15 of the Canadian Extradition Act[1] the judge is obliged to see whether or not the crime charged is an extradition crime. As above stated it is obvious that these indictments charge the commission of many criminal offences committed by means of false and fraudulent statements made over the long distance telephone from Montreal which amounted to fraud and false pretences and in which there was no use of the mails.

" As already stated obtaining money by false pretences has not been proved to be a crime by the law of the State of Michigan. Moreover the false representations over the long distance telephone were made in Montreal and are not mail frauds.

" Although para. 11B deals with making use of the mails in connection with schemes devised or intended to deceive or defraud the public or for the purpose of obtaining money under false pretences, it would be manifestly unjust, unfair and grievously prejudicial to the accused to surrender them for trial on indictments where, in addition to the charges of fraudulent use of the mails, fraudulent telephone calls constituting false pretences and fraud committed in Canada without using the mails would also be put to the jury.

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[1] R.S.C. 1952, c. 322.

"It was further contended for the accused that the Michigan Federal Court did not have jurisdiction on the evidence made at the hearing, as the letters were posted in Canada, and ss. 1341 and 77 of the U.S. Code only referred to mail frauds in the United States. Mr. Meagher,[1] in testifying as to the United States Federal law referred to two mail fraud cases, namely, *United States* v. *Steinberg* (1932), 62 Fed. (2d) 77, and *Kaufman* v. *United States* (1947), 163 Fed. (2d) 404. He also cited certain judgments of the Supreme Court. None of these was an extradition case. Counsel for the applicant referred to two English cases, namely, *R.* v. *Nillins* (1884) L.J.M.C. 157, and *R.* v. *Godfrey*, [1923] 1 K.B. 24.(2) Both of these cases dealt with false pretences, for which there was extradition with Germany and Switzerland respectively. In Canada there does not appear to be any judgment interpreting s. 209 (c)[3] of our Code in the same sense, either before or after the 1951 amendment. It has become unnecessary for me to decide this interesting question."

[Report: [1955] 3 D.L.R. 386.]

Extradition—Conditions of—Depositions Not Sufficient by Local Law but Sufficient by Law of Requesting State—Evidence Not on Oath—Extradition Improperly Ordered—The Law of Israel.

WASKERZ *v.* ATTORNEY-GENERAL.

Israel, Supreme Court sitting as High Court of Justice. July 26, 1954.
(Agranat, Zussman and Landau JJ.)

THE FACTS.—This was an application for an order of *habeas corpus* after a competent Court had ordered the extradition of the petitioner to France. Extradition between Israel and France was governed by the Anglo-French Extradition Treaty of 1876, as brought into force between Israel and France by various exchanges of notes (see *Israel Treaty Series*, Nos. 31, 82 and 131). The depositions on which the extradition had been ordered were unsworn statements made in France, and the sole question to be decided was whether, under the (Palestine) Extradition Ordinance (Laws of Palestine, Ch. 56), that evidence was sufficient. By s. 12 of the Ordinance, a fugitive criminal could be extradited only on the basis of such evidence as would, according to the law of Israel, justify the committal for trial of the prisoner if the crime had been committed in Israel. The law of Israel required such evidence to be on oath. In the Extradition Treaty (Article 8) the French text used the expression 'Les dépositions', while the English text used the word 'depositions'.

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[1] An expert witness.

(2) See *Annual Digest*, 1919–1922, Case No. 190.

[3] Section 209 (*c*) reads as follows:

> "209. Every one is guilty of an indictable offence and is liable to two years' imprisonment who makes use of the mails for the purpose of transmitting or delivering
>
> (c) any letter or circular concerning schemes devised or intended to deceive and defraud the public, or for the purpose of obtaining money under false pretenses."

Held: that on a proper construction of the Extradition Ordinance the unsworn statements were insufficient, and the order *nisi* must be made absolute.

The following passages from the judgment of Agranat J. are of interest from the point of view of international law. "Mr. Kokia [Counsel for the respondent] asked us to answer the question in the affirmative. His premiss was that when the Court has to consider the admissibility of evidence in support of a request for extradition, it should not adopt too strict an approach. Rather should its attitude be a liberal one. This is so for two reasons: first, to prevent the frustration of the purpose of the [Extradition] Ordinance, which has as its objective the operation of a certain procedure designed, in accordance with agreements between Israel and a foreign State, to provide for the extradition of requested persons so that they may appear in answer to criminal charges; and second, in the light of the consideration that we are not concerned with a substantive trial but merely with procedural steps intended to ensure the transfer of the fugitive offender abroad where he will be able to defend himself against the charges for which his extradition was requested. At all events, Mr. Kokia emphasized, that approach is justified when the law of evidence of the requesting State permits written evidence not on oath."

[This contention was rejected in the light of a long line of English precedents which were binding in Israel. Then the Judge turned to the argument that the relevant provisions of the Extradition Ordinance (following, in this respect, s. 14 of the English Extradition Act, 1870) have to be interpreted subject to Article 8 of the Anglo-French Extradition Treaty of 1876. He said:] "Since the French text used the expression 'les dépositions' and the English text 'depositions', it is only right [so runs the argument] to give the two expressions a single meaning, and that is, that each apply to depositions taken in France and in accordance with French procedure, *i.e.*, not necessarily on oath or on affirmation. Our answer to this argument is that one text cannot be regarded as expressing exactly what appears in the other, and a local Court cannot prefer the French text to the English. See the speech of Lord Russell in *Re Arton* (No. 2), [1896] 1 Q.B. 509 at p. 514. Furthermore, in the event of a discrepancy between the provisions of a statute and the stipulations of a treaty, the statute prevails. See Lord Chelmsford in *Re Copplin*, (1866–7) 2 Ch.A.C.47 at p. 53 . . ."

The Court did not consider that its interpretation would frustrate the purposes of the Ordinance, or those of the Treaty between Israel and France.

[Reports: *Piskei-Din*, vol. 8 (1954), p. 1009; *Pesakim Elyonim*, vol. 16 (1954), p. 161.]

NOTE.—By the Extradition Law, 5714–1954, the mandatory Ordinance was repealed and it was provided, in s. 12, that the provisions of any extradition treaty regarding evidence would take precedence over those of the domestic law.

Extradition—Conditions of—Requirement of Proof of Nature of Alleged Offence—The Law of Argentina.

Re VAN LIERDE.

Argentina, Cámara Nacional Especial. April 1, 1954.

THE FACTS.—The *Juge d'instruction* of Oudenaarde, Belgium, requested the extradition of Alban F. J. R. van Lierde, a Belgian national, on a charge of homicide. The request was based on the Extradition Treaty of August 12, 1886, between Argentina and Belgium. In his defence, the accused pleaded that the act of homicide was a political offence. Referring to the Belgian Decree-Law of June 22, 1945, which provided that an offence committed between May 9, 1940, and up to 41 days after the definitive date of liberation of the place in which the offence was committed, would be treated as an act of resistance to the enemy and not as a crime, the accused sought to show that his victim, Robert de Caluwe, had collaborated with the enemy, that the place of the offence was Nieuwenhove, which was liberated on September 3/4, 1944, and that the offence took place on September 5, 1944. It was also stated that the accused had been decorated by the Belgian Government for his part in the resistance movement.

Held: that the extradition request must be denied. Extradition would not be granted where the requesting State had not complied with treaty requirements regarding the legal proofs which must accompany the request.

The Court pointed out that two questions were involved in the case, namely, whether the offence was political in nature and whether the extradition request conformed to all the requirements of the Convention. The Court continued: " Article 3 of the Treaty provides that extradition may not be granted for a political offence nor for an act in which there is a political crime element. Logically, then, it must be established whether the homicide of Robert de Caluwe has the character of a political offence or whether it is simply a common crime. The victim was suspected of treason, in the form of collaboration with the Germans who had invaded Belgian territory. For his part, the accused was an active member of the national armed resistance movement.

" In order to establish whether the death of the alleged traitor was a legal or an illegal act, it must be determined whether this act arose out of the imperative necessity of the existing state of war. The requesting Judge should have furnished our Government with all the basic proofs so that a definitive judgment could be reached in the action, but such proofs have not been submitted in the instant case.

" In regard to the matter of compliance with legal requisites, as the *Fiscal de Cámara* stated in his report to the Court, the Convention of August 12, 1886, provides that the extradition request must be accompanied by documents which ' shall indicate the nature of the charge and include the text of the pertinent penal law ' (Article 10). This provision was undoubtedly intended to enable the Judge to determine whether the action or penalty was barred by lapse of time and whether the principle of double criminality (*identidad de norma*) had been observed.

" Notwithstanding the express provision of this Treaty, the extradition request was not accompanied by a copy of the Decree-Law of June 22, 1945, which is at issue in the present case. Without the text of the Decree-Law, it is impossible to determine whether Van Lierde is protected by this Law. The absence of this text impedes the exercise of the right of defence guaranteed to the accused by the Constitution[1] and laws of the Argentine Republic."

[Report: 75 *Revista Jurídica Argentina La Ley* (July–September 1954), p. 620.]

The judgment of the Cámara Nacional Especial was affirmed by the Supreme Court on June 16, 1954 (229 *Fallos de la Corte Suprema*, p. 124).

Extradition—Conditions of—Absence of Extradition Treaty.

Re GALARZA DE LA PEÑA.

Venezuela, Federal Court. September 24, 1954.

THE FACTS.—Mexico sought the extradition of Luis Galarza de la Peña, a Mexican national, on a charge of embezzlement. There was no extradition treaty between Mexico and Venezuela.

Held: that the extradition request should be granted.

The Court, finding that the extradition request conformed to the requirements of Venezuelan law, said: " Although our country does not have an extradition treaty with the Republic of Mexico, extradition may be granted on the basis of reciprocity pursuant to the provisions of Articles 389 and 393 of the Venezuelan Code of Criminal Procedure, which are in accord with the principles of international law regarding this matter."

[Report: *Gaceta Forense* (2a Etapa), No. 5 (July–September 1954), p. 198.]

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[1] *Anales de Legislación Argentina*, IX-A, p. 1.

Extradition—Conditions of—Requirement of Existence of a Treaty.

See p. 66 (*Ivanevic* v. *Artukovic; Ware* v. *Artukovic*).

V.—Political Crimes

Extradition — Political Offences — Meaning of — Offences Committed to Escape from Political Tyranny—Extradition Act, 1870 —Jurisdiction of Magistrate.

REGINA *v.* GOVERNOR OF BRIXTON PRISON, *Ex parte* KOLCYZNSKI AND OTHERS.

England, Queen's Bench Division. December 13, 1954.
(Lord Goddard C.J., Cassels and Devlin JJ.)

THE FACTS.—This was a motion for habeas corpus, the applicants being seven Polish nationals serving on a Polish trawler fishing in the North Sea, who in September 1954 decided to seek political asylum in England. To this end they overpowered the captain and other members of the crew, only one of whom offered any resistance, and brought the vessel into an English port, where they were arrested and detained.

The Polish Government, pursuant to the Extradition Treaty of January 11, 1932, between the United Kingdom and Poland, sought the extradition of the prisoners on the ground that they had committed various extraditable crimes.

The magistrate before whom the prisoners appeared found as a fact that, while at sea, a political officer on the trawler noted the applicants' conversations, probably with a view to preparing a case against them on account of their political opinions. He concluded that the only object of the prisoners in seizing the trawler was to escape from their native country in which they had suffered frustration and repressions, and that they achieved this with the minimum injury to persons or property.

He left to the High Court the question whether in these circumstances the offences with which the prisoners were charged were political offences in the sense of s. 3 (1) of the Extradition Act, 1870.

(A more detailed description of the certain circumstances of the facts appears in the judgment of Cassels J. below.)

Held: that all the applications must be allowed, the applicants having shown to the satisfaction of the Court that the request for extradition had been made with a view to trying them or punishing them for a political offence.

Cassels J. read the first judgment: " The court has already directed that the writs of habeas corpus do issue in each of these seven cases. That meant that the applicants were entitled to release, and they have been released, from custody in these extradition proceedings. They have also been given permission by the Secretary of State to stay in this country.

"In September, 1954, the applicants were members of the crew of a small trawler fishing in the North Sea as part of a Polish fishing fleet. On this trawler the captain was in charge of the navigation only. A political commissar and a party secretary, who was nominally an engineman, were really in control of the crew. They exercised supervision over the crew's political leanings, and noted their conversations, doubtless for future action, though at the most material times the commissar had gone aboard another of the trawlers in the fleet, namely, the mother ship. One of the applicants, by name Kolczynski, a fisherman, had a brother serving in one of the other trawlers in the fleet. News that that brother had escaped to England came over the trawler's wireless, and from that moment this man Kolczynski on board this trawler was kept under special observation. Another fisherman, Radylezenski, was told by the political secretary to get rid of a picture of the Virgin Mary which he had over his bunk. His refusal led to a dispute. When the applicants were in conversation with each other it was observed that the political secretary was listening in and afterwards that he was making a note. All this caused the applicants to arrive at the conclusion that if they remained on the trawler until they reached Poland again they would be dealt with according to the constitution of the Polish People's Republic and the severity of the Polish law would be applied to them. They, therefore, decided to take charge of the trawler and steer her to an English port. To accomplish this, and in furtherance of this project, they barred the door of the water-closet where the captain had gone for refuge (it was said without much resistance) and they directed an assistant engineman to work the engines, and they put the other members of the crew under restraint. The political secretary showed fight when awakened in his cabin, but was overpowered, being slightly cut on the hand by a fisherman's knife in the hands of Kolczynski. When the trawler reached Whitby, the applicants marched off and asked for political asylum. They were imprisoned.

"The Polish government applied for the extradition of each of the applicants on offences alleged against each: use of force, depriving his superiors and other members of the crew of their freedom, wounding one member of the crew (in fact the political secretary), damaging the trawler's wireless installation, preventing the captain of the trawler from directing her, thus exposing the Polish vessel to the danger of calamity at sea and the entire crew to loss of life. This application of the Polish government came before the learned chief magistrate at Bow Street Police Court on Nov. 3, 10, 16 and 23, 1954. On Nov. 24 the learned chief magistrate, having considered evidence taken in Poland, the evidence of the applicants, evidence of the British Ambassador to Poland from 1945 to 1947 and of a press attaché during the same period, and evidence of a member of the staff of the British Embassy in 1951 to 1952, came to the conclusion that the only object which the applicants had in mind was to leave their country in which they suffered an intolerable sense of frustration and repression and to seek a fresh life somewhere else, and that they achieved their object with the smallest amount of injury to persons and property, and he left the declaration of the law to this court through the applicants' application for writs of habeas corpus.

" The following points seem to emerge from the evidence taken at Bow Street. Between 1945 and 1947 Poland became a police state ruled by terrorism. The communist party became the only party in the state with complete control with the help of the security police. Anyone opposed to the communist régime is arrested and some disappear. Relatives, too, are arrested. It is an offence to leave the country. Ninety per cent. of the population is opposed to the communist régime. Political agents spy on other people and make reports. The activities of the secret police penetrate into all walks of life. England is not regarded as a friendly country; on the contrary it is looked on as an enemy country. To go to a Western country without permission is treason. If a Pole were outside Poland and heard that his brother had fled to the West he would be very unwise to return to Poland. If he returned to Poland he would be punished.

" By the Extradition Act, 1870, s. 3 (1), it is declared that

> 'A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate or the court before whom he is brought on habeas corpus, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character.'

" The treaty between this country and Poland makes a similar provision. According to Art. 79 (2), in chapter 7, entitled ' Citizens' Rights and Duties ', of the Constitution of the Polish People's Republic, voted by the legislature on July 22, 1952,

> ' Treason of the Country: spying, weakening of the armed forces, going over to the enemy—being the greatest crime, will be punished with all the severity of the law.'

Treason is an offence of a political character, and is not included in the offences mentioned either in Sch. I to the Act of 1870 or in the treaty, but, in both these, assaults and revolt or conspiracy to revolt on board a ship are included.

" During their imprisonment letters from relatives had been handed to all the applicants. Some of the applicants say that they are not genuine letters, that the language used is not the language of the writers, and one of them says that a letter from his brother must have been dictated by a member of the security force. One brother's letter uses the phrase, ' I condemn with scorn your action of having yourself sold to the American imperialists ' and refers to ' repaying education and advantages with treason.' A family letter talks of the 'influence of the imperialistic propaganda'. A brother writes, 'You have betrayed your brothers and your own country.' Another brother writes, 'You have left your sisters and brother in the country and followed the capitalists'. A cousin writes, 'You are a traitor to the country and a traitor you will remain until your death. You have abandoned and betrayed your country. You have escaped to our enemies.' There is an indication in the letters that some of the relatives of these men had been removed from their homes in the early days of October, for some of the letters are dated prior to the taking of the evidence of the captain and other witnesses in Poland on Oct. 8 after the trawler had arrived back.

"It is submitted on behalf of the applicants that if they should be extradited they may well only be tried for the offences for which their extradition is requested, but they will be punished as for an offence of a political character, and that offence is treason in going over to the capitalistic enemies. Everything in the case points that way and for that reason I agree that the writs of habeas corpus should issue.

"As to the meaning of the phrase 'an offence of a political character', definitions were considered in *Re Castioni* [1891] 1 Q.B. 149. John Stuart Mill's definition, 'Any offence committed in the course of or furthering of civil war, insurrection, or political commotion', was rejected as too narrow, and the definition by Stephen, J., in his *History of the Criminal Law of England*, vol. 2, p. 71, '. . . fugitive criminals are not to be surrendered for extradition crimes if those crimes were incidental to and formed a part of political disturbances' was preferred. Hawkins, J., who cited this passage with approval ([1891] 1 Q.B. at p. 166), also expressed the view (*ibid.*, at p. 163) that it was not for the magistrate to decide whether the requisition for the surrender of the fugitive criminal has in fact been made with a view to try to punish him for an offence of a political character, but that under s. 9 of the Act of 1870 all he had to do was to hear the case in the same manner, and have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England, and merely to receive evidence which might be tendered to show that the crime of which the prisoner is accused is an offence of a political character and not an extradition crime. To interpret that Act in such a way seems to me to ignore the words of s. 3 (1): 'if he prove to the satisfaction of the police magistrate . . .' On this case the learned chief magistrate has left the decision to this court, being the court before whom the applicants are brought on habeas corpus.

"The words 'offence of a political character' must always be considered according to the circumstances existing at the time when they have to be considered. The present time is very different from

1890 when *Castioni's* case was decided. It was not then treason for a citizen to leave his country and start a fresh life in another. Countries were not regarded as enemy countries when no war was in progress. Now a state of totalitarianism prevails in some parts of the world and it is a crime for citizens in such places to take steps to leave. In this case, the members of the crew of a small trawler engaged in fishing were under political supervision. The applicants revolted by the only means open to them. They committed an offence of a political character and if they were surrendered there could be no doubt that, while they would be tried for the particular offence mentioned, they would be punished as for a political crime. Thus they have brought themselves within s. 3 (1) and made good their claim to have the restrictions referred to observed."

Lord Goddard C.J. said: "The questions that arise under s. 3 (1) of the Extradition Act, 1870, are: (i) whether the offence for which extradition is sought is an offence of a political character, or (ii) have the applicants proved to the satisfaction of this court before whom they are brought on habeas corpus that the requisition has, in fact, been made with a view to trying and punishing them for an offence of a political character.

"This section is somewhat obscure, especially when it is remembered that by sub-s. (2) a criminal is not to be surrendered to a foreign state unless provision is made by the law of that state or by an arrangement, which must mean by treaty, that he shall not be tried by the foreign state for any offence committed prior to his surrender other than that for which the surrender is granted. This arrangement has been made by a treaty signed on January 11, 1932, between His late Majesty King George V and the President of the Republic of Poland and will be found in the Poland (Extradition) Order in Council, 1934 (S.R. & O. 1934 No. 209). The court must not assume that the foreign state will not observe the terms of the treaty: see *Re Arton* (*No.* 1) [1896] 1 Q.B. 108. The second limb of the section cannot, therefore, in my opinion, mean that the court may say, if extradition is sought for crime 'A' we believe that, if the prisoner is surrendered, he will be tried or punished for crime 'B'. None of the offences in Sch. I to the Act are prima facie political. The precise meaning of this difficult section has not yet been made the subject of judicial decision and text-writers have found it difficult of explanation, but in my opinion the meaning is this. If, in proving the facts necessary to obtain extradition, the evidence adduced in support shows that the offence has a political character, the application must be refused, but although the evidence in support appears to disclose merely one of the scheduled offences, the prisoner may show that, in fact, the offence is of a political character. Let me try to illustrate this by taking a charge of murder. The evidence adduced by the requisitioning state shows that the killing was committed in the course of a rebellion. This at once shows the offence to be political;

but if the evidence merely shows that the prisoner killed another person by shooting him on a certain day, evidence may be given, and under s. 9 the magistrate is bound to receive it, to show that the shooting took place in the course of a rebellion. Then if either the magistrate or the High Court on habeas corpus or the Secretary of State is satisfied by that evidence that the offence is of a political character, surrender is to be refused. In other words the political character of the offence may emerge either from the evidence in support of the requisition or from the evidence adduced in answer.

"The present case, in my opinion, comes within the second limb. Prima facie, the evidence in support of the requisition merely shows a revolt by two or more of the persons charged on board a ship on the high seas against the authority of the master, and this is a scheduled offence. The evidence, the truth of which the magistrate accepted, showed that the applicants while at sea found that a political officer was overhearing and recording their conversations and keeping observation on them for the purpose of preparing a case against them on account of their political opinions, presumably in order that they might be punished for holding or, at least, expressing them. A resultant prosecution would thus have been a political prosecution. The revolt of the crew was to prevent themselves being prosecuted for political offences and in my opinion, therefore, the offence had a political character. I would emphasise that, although the requisitioning Power is diplomatically represented in this country, no attempt was made to controvert or displace the evidence of the applicants or of the witnesses called on their behalf. The Polish government were not represented before the magistrate or this court and cannot, therefore, complain if the court accepts the evidence given on this matter by or on behalf of the applicants.

"The learned chief magistrate, while accepting the evidence, thought that, as the only decision as to what constituted a political offence was that to be found in *Re Castioni*, he was bound to commit and to leave it to this court to say whether that decision was conclusive or whether the words 'of a political character' could be extended to the facts which he found. I desire to say that in my opinion, in the circumstances of this case, the course which he took was entirely proper. It is clear from his careful judgment that, had he thought it open to him, he would have held the offence to be political. Now the court in *Castioni's* case were careful to say that they were not giving an exhaustive definition of the words 'of a political character'. They applied a formula taken from Stephen's History of the Criminal Law, vol. 2, p. 71, as sufficient for the facts of that case, and no doubt, when that work was written, about 1882, no better definition could be given. No doubt, the conception of what is commonly called nowadays a 'police state' was not unknown in the middle years of the nineteenth century. One need only recall the vigour of Mr. Gladstone's language and some of Lord

Palmerston's dispatches as to the state of affairs prevailing in Naples, then a part of the Kingdom of the Two Sicilies, under the despotic rule of a monarch usually referred to as King Bomba. All that, however, had passed by the time Sir James Fitzjames Stephen wrote, though, no doubt, political police were still very active in Czarist Russia. The evidence as to the law prevalent in the Republic of Poland today shows that it is necessary, if only for reasons of humanity, to give a wider and more generous meaning to the words we are now construing, which we can do without in any way encouraging the idea that ordinary crimes which have no political significance will be thereby excused.

" This is enough to dispose of the case, but we have been pressed by the Attorney-General to consider the opinion of Hawkins, J., in *Re Castioni*, where he appears to hold ([1891] 1 Q.B. at p. 163) that the magistrate cannot decide the question whether or not the offence is political although he concedes that it is open to this court to do so on a motion for a habeas corpus. *Castioni's* case was in some respects adversely criticised in *R.* v. *Holloway Prison* (*Governor*), *Re Siletti* (1902), 71 L.J.K.B. 935. The court, Gigham J., and Darling J., were both of opinion that the observations in *Castioni's* case that the court could revise the decision of the magistrate on the evidence were obiter, and inconsistent with the decisions in *Ex p. Huguet* (1873) 29 L.T. 41, *R.* v. *Maurer* (1883) 10 Q.B.D. 513, and *Re Arton* (*No.* 2), [1896] 1 Q.B. 509. In the latter case Lord Russell of Killowen C.J., said ([1896] 1 Q.B. at p. 518):

> " 'We are not a Court of Appeal on questions of fact from [the magistrate]. We have only to see that he had such evidence before him as gave him authority and jurisdiction to commit.'

In *Siletti's* case Bigham, J., said (71 L.J.K.B. at p. 937):

> ' . . . the only question that this court can entertain is the question of jurisdiction. Applying the observation to this particular Act, the accused may say that the crime with which he was charged was not a crime within the meaning of the Act—that is to say, that it did not come within the class of offences contemplated, or that it was an offence of a political character, and therefore was outside the Act altogether.'

This appears to me to lay down the true rule; the effect of s. 3 (1) is to prevent a crime of a political character coming within the purview of the Act. If, then, the crime is of that character, the magistrate has no jurisdiction to commit. If the magistrate wrongly gives himself jurisdiction by holding that a crime is not of a political character when it is, this court can and must interfere, and both *Re Castioni* amd *Re Siletti* affirm this. Moreover, apart from authority this is what, in my opinion, the statute provides. Clearly the second limb of s. 3 (1) contemplates a decision of the magistrate on the subject, the first limb, as I have said above, deals with an offence which the evidence called to support extradition shows is political. The second limb contemplates a charge which on its face appears to be one of those set out in Sch. I to the Act, but which on examination of the evidence tendered is shown to be really of a political character. The magistrate must give a decision on this matter and his decision is open to review on habeas corpus. In support of this view I would refer to the statutory form of the warrant of committal in Sch. II to the Act. It recites ‘ and forasmuch as no sufficient cause has been shown to me why he should not be surrendered . . . ’ If the magistrate can decide that there is no sufficient cause for refusing to surrender the prisoner, it must follow that he can also find that there is. Section 9 requires the magistrate to hear the case in the same manner and with the same jurisdiction and powers as if the prisoner was before him charged with an indictable offence and to receive any evidence which may be tendered to show that the crime of which the prisoner is accused is of a political character and not an extradition crime. Hawkins, J., in *Castioni's* case seems to have thought that this required the magistrate merely to take the evidence of witnesses for the defence so that it could be considered either by this court or by the Secretary of State, and he referred ([1891] 1 Q.B. at p. 163) to Russell Gurney's Act (30 & 31 Vict. c. 35). With all respect to the opinion of one who was a great authority on criminal law, the provision in that Act to which he was referring was, I think, intended to fill a gap in the Indictable Offences Act, 1848. The latter Act did not appear expressly to contemplate taking the depositions of and binding over witnesses for the defence, and this was remedied by s. 3 of Russell Gurney's Act (the Criminal Law Amendment Act, 1867). However that may have been, the position is now clarified by s. 12 (8) of the Criminal Justice Act, 1925, which provides that, before determining whether or not to commit for trial, any statement by the accused and any evidence given by him or his witnesses must be taken into consideration. Accordingly, I am of opinion that it is the duty of the magistrate to determine on the whole of the evidence whether or not the offence is of a political character, and also whether it is an extraditable crime. He cannot determine this finally against the prisoner because the latter can question the decision on habeas corpus. This does not mean that this court will review the magistrate's findings of fact, but they will and must consider the result of those findings.”

[Report: [1955] 1 All E.R. p. 31.]

PART VII

DIPLOMATIC AND CONSULAR INTERCOURSE AND PRIVILEGES

A—PERMANENT DIPLOMATIC ENVOYS

III.—Privileges and Immunities of

i.—Diplomatic Envoys and their Staff

Diplomatic Immunity—Waiver of—Defendant Envoy Failing to Appear—Whether Failure to Put in Appearance Constitutes Submission to Jurisdiction.

Re FRANCO-FRANCO.

France, Cour de Cassation. February 5, 1954.

THE FACTS.—One K., a former employee of the Ambassador of the Dominican Republic in Paris, sued the Ambassador in a French court for certain monies allegedly owing to him by reason of his former employment. The Ambassador took no part in the proceedings, and the Judge of the court of first instance, construing the Ambassador's silence as a waiver of immunity, gave judgment against him in default of appearance. The Procureur Général of the Cour de Cassation appealed, on the ground that the failure of a person of diplomatic status to take part in proceedings did not constitute a voluntary submission to the jurisdiction.

Held: that there had been no voluntary submission to the jurisdiction, and the judgment must be set aside.

The Court said: "The Decree of the National Convention of 13th Ventôse, Year II, which 'forbids any established authority to lay hands in any manner whatsoever on the person of the envoy of any foreign government', is a provision based on the reciprocal need for the independence of States and is the basis of the rule that diplomatic agents of foreign Powers are not, in general, subject to the jurisdiction of the French courts. There can be no derogation from this immunity except where such persons have clearly and properly accepted the jurisdiction of the courts in which they are sued. On March 2, 1951, one Koenig, a former employee of the Embassy of the Dominican Republic in Paris, sued Dr. Tulio Franco-Franco, the Ambassador of that foreign Power, for payment of certain monies allegedly due to him by reason of a contract of employment formerly subsisting between the parties. The Judge of first instance, having found that there was default of appearance on the part of the defendant, gave judgment on the plaintiff's claim on March 15, 1951. The failure of the diplomatic envoy to put in an appearance cannot be regarded as a clear and proper acceptance of the jurisdiction of the Court in which the action had been brought. The judgment under appeal therefore violated the law referred to above, and it must be set aside as being *ultra vires*."

[Report: *Clunet*, 81 (1954), p. 782.]

Diplomatic Privileges—Acts of a Private Law Nature—Action in Respect of Guarantee given by Member of Embassy.

RIBEIRO *v.* CHINATTI.

Brazil, Justice Court of the Federal District of Rio de Janeiro.

June 23, 1954.

THE FACTS.—Chinatti, an attaché at the Austrian Embassy in Rio de Janeiro, was sued by Aluizio Clark Ribeiro in respect of a guarantee given by him as guarantor in the matter of the rent of a house in that city. The action was challenged by Chinatti on the ground that, as a result of his position as a member of a foreign Embassy, he was immune from the jurisdiction of the Brazilian courts.

Held: that the Brazilian courts had no jurisdiction. The principle of diplomatic immunity " establishes the incompetence of the local justices and courts for the adjudication of actions brought against foreign diplomatic envoys, except in cases of explicit submission authorized by their respective Governments."

[Report: *Arquivo Judiciario*, vol. 113 (January–March, 1955), p. 182.]

iv.—The Official Residence of a Diplomatic Envoy.

Diplomatic Privileges and Immunities—Diplomatic Premises—Exterritoriality of Embassy—Whether Belgian Embassy in Berlin Part of Belgian Territory.

BELGIAN STATE (MINISTER OF PUBLIC WORKS AND RECONSTRUCTION) *v.* MARÉCHAL.

Belgium, Conseil d'État. April 30, 1954.

THE FACTS.—A Belgian Law of October 1, 1947, provides for the intervention of the State in the reparation of damage caused by war on Belgian territory after August 27, 1939. By a decision of April 17, 1953, the *Commission d'appel des dommages de guerre aux biens privés* of Brabant applied that provision to a claim by Louise Maréchal in respect of damage arising out of the destruction of property in the buildings of the Belgian Embassy in Berlin. The Minister of Public Works now sought to have that decision set aside, on the ground that the buildings of the Belgian Embassy in Berlin were not " Belgian territory ".

Held: that the decision of the Commission d'appel of April 17, 1953, must be set aside. The buildings of the Belgian Embassy in Berlin were not Belgian territory.

The Court said: " The parts of foreign territory in which international custom or treaty gives Belgium rights of exterritoriality do not, by virtue of that fact, become Belgian territory. A Law the benefit of which is expressly made subject to the condition that the damage must have been suffered on Belgian territory, can be extended to cover foreign territory wherein Belgium enjoys the privilege of exterritoriality only by a liberal interpretation. Such an interpretation should be based on instruments or preparatory work clearly indicating the intention of the Legislature.

" It is true that the general purpose of the Law, which is to restore the national heritage, is not opposed to indemnification of movable property destroyed abroad, where such property belonged to Belgian nationals and is to be replaced in Belgium. In fact, the Legislature provided in Clause 2 of paragraph 1 of Article 1 of the Law that ' damage caused to property belonging to Belgian nationals abroad may give rise to the same intervention on conditions subsequently to be laid down by Royal ordinances considered by the Cabinet '. However, no Royal ordinance has as yet extended the intervention of the State to damage suffered in parts of foreign territory where Belgium enjoys rights of exterritoriality."

[Report: *Pasicrisie belge*, 1955, IV, p. 112.]

D—CONSULS

II.—Position and Functions of Consuls

Consuls—Consular Powers—International Custom—Power to Take Affidavit—Powers of British Consuls in Connection with Palestine—Powers of Israel Consuls.

GORALI *v.* DISKIN.

Israel, Supreme Court sitting as Court of Civil Appeals. April 30, 1954.
(Ollshan, Deputy Chief Justice; Silberg and Goitein JJ.)

THE FACTS.—The sole issue in this case was the admissibility of answers to interrogatories, contained in an affidavit sworn before the Israel Consul in Buenos Aires. Rule 2 of the Civil Procedure Rules defines an affidavit as a statement in writing lawfully sworn, affirmed or declared in accordance with the Oaths Ordinance, 1935, or, if made outside Israel, a statement in writing sworn or affirmed in the manner provided by the law in force in the place where the oath or affirmation is made. The lower Court had declared the answers inadmissible on the ground that the law of Israel did not confer the necessary power on Israel Consuls, although in the period of the Mandate British Consuls had performed that function.

Held: that the Consul was empowered to administer an oath and that the affidavit was admissible. The judgment of the Court was given by Goitein J., who said: " The solution of the problem depends upon the interpretation of section 14 (b) of the Law and Administration Ordinance, 1948,[1] and the presumption *omnia rite et solemniter acta*. When a Consul of Israel . . . administers an oath and charges the deponent the proper fee as laid down in the tariff established by the Foreign Ministry, it is to be assumed that the local law, in the instant case the law of Argentina, permits that action. Any person—here the respondent—who wishes to attack an affidavit sworn before the Consul, has to establish affirmatively that the law of Agentina differs from the law of other countries, and that what the Israel Consul did was contrary to the local law. The respondent has not discharged that burden of proof and we have before us an affidavit which *prima facie* is valid.

[The judge quoted from the definition of affidavit in the Civil Procedure Rules and the terms of the consular certificate on the document, from which its *prima facie* validity was deduced, and indicated that no evidence had been brought either concerning the law of Argentina or to show that the consular certificate was incorrect. He went on:]

" Our law contains more than a hint that, in accordance with international practice, the local law recognizes the right of a consul, or other representative, to administer an oath. From section 18 of the Evidence Ordinance we see that a British consul abroad could [during the Mandate] accept declarations on oath. Obviously, the law of Palestine could not grant to British consuls anywhere the power to administer oaths unless they were already so empowered and, according to international custom, the other countries recognize the power of the consul to administer oaths in connexion with declarations required for proceedings in the courts of his own State. There may be some exceptional countries which do not permit foreign consuls to administer oaths. If there are such countries, then any person objecting to the admissibility of an affidavit received therefrom must prove that country's law. A District Court in Israel is not entitled, in the absence of such proof, to assume that the law of Argentina is exceptional, and that the Israel Consul in Argentina was acting contrary to the law, and that he charged the sum of I£. 1.500 without a basis in law, and affixed the consular seal to a worthless document. The legal presumption is not *omnia rite non acta*, but the reverse.

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[1] Section 14 (b) provides: " Any power vested under the law in British consuls, British consular officers or British passport control officers, shall henceforth vest in consuls and officers to be appointed for that purpose by the . . . Government [of Israel]."

" On that assumption only we could dispose of this appeal and admit the affidavit. However, the judgment of the lower Court includes the following passage: '. . . Even if may assume that in every case . . . an affidavit given abroad before an Israel Consul may be regarded as having been given in accordance with the local law if it had been given in accordance with the law of Israel . . . it must be proved that an Israel consul abroad is empowered to accept affidavits.' I do not think, in the light of Rule 2 of the Civil Procedure Rules, that this question arises. But if it does arise, it seems to me that the learned Judge erred in his solution. [After quoting from section 14 (b) of the Law and Administration Ordinance, he continued:] Where shall we look for the powers of a British consul? In my opinion—to the law of England. But the learned District Court Judge thought that we have to look to the law of Palestine to ascertain what were the powers of a British consul before the establishment of the State.

" As I have already indicated, the Government of Palestine could not confer powers on British consuls. The situation of Palestine as regards British representatives was no different from that of any other country. Let us assume that China enacted that every British Consul was to affix a Chinese stamp on every passport intended for use in China; that law would not confer any power on a British Consul. In order to achieve that result, the two countries would have to come to an agreement; and then Great Britain, by virtue of the agreement, and not China, would give the necessary authority to the British consul to affix the Chinese stamps. It follows that not China in that instance, and likewise not the law of Palestine, can confer powers upon British consuls.

" To return to our question: by reference to what law are we to seek the powers of British consuls when they were acting in a matter concerning Palestine? The answer is clear: the law of Great Britain, which is the only law conferring powers upon all British representatives throughout the world. There we will at once find what we are looking for, in section 6 of the Commissioners for Oaths Act, 1883 . . . During the period of the Mandate, any affidavit taken by a British consul for use in the Courts of Palestine was accepted in the Courts.

" When we read section 14 (b) of the Law and Administration Ordinance in the light of these remarks, it follows that every Israel consul, wheresoever serving, is permitted in that place to administer an oath and take an affidavit, and any such oath or affidavit will have the same force and effect as if it had been administered or taken by duly constituted authority in Israel, since the Israel Legislature intended to confer upon Israel consuls the same powers as British consuls had in the past in relation to Palestine . . ."

Olshan, Deputy C.J., concurred in that judgment as far as concerned Rule 2 of the Civil Procedure Rules, and thought that it was unnecessary to consider section 14 (b) of the Law and Administration Ordinance.

Silberg J., (dissenting), said : "The Court below had no evidence regarding the law of Argentina and we do not know if *that law* permits foreign consuls in Argentina to administer oaths. This case concerns answers to interrogatories included in an affidavit in an ordinary litigation. It is not a matter of personal status, so that we cannot rely on the decision of this Court in *Landau* v. *Borwin* [see *International Law Reports*, 1953, p. 389]. Even if we assume, on the basis of the well-known presumption of identity of laws, that the law of Argentina grants the same powers to foreign consuls, including the consul of Israel, to perform all those actions which the law of Israel permits to foreign consuls in Israel [*i.e.*, in matters of personal status only], we would still be lacking evidence that the law of Argentina permits foreign consuls to take affidavits in matters *other than* matters of personal status. On the contrary. That same presumption must lead us to the conclusion that the Israel Consul in Buenos Aires was not authorized by the law of Argentina to take the affidavit.

"The question therefore remains: Can we assume, and on what basis, that the affidavit is valid by the law of Argentina, and *a fortiori* by our own law? . . ."

The Judge answered this question in the negative, not seeing either in the presumption *omnia rite esse* sufficient to counteract the presumption of identity of laws unless the contrary is proved, and not finding in the law of Israel specific power for Israel consuls to take affidavits.

[Reports: *Piskei-Din*, vol. 8 (1954), p. 521; *Pesakim Elyonim*, vol. 15 (1954), p. 280.]

Note.—This case resolves a problem which had caused a sharp cleavage of judicial opinion in Israel. The Jerusalem District Court in its decision in this case, *sub nom. Diskin* v. *Gorali* (*Pesakim Moheziim*, vol. 9 (1954), p. 273), of December 31, 1953, had rejected the admissibility of the affidavit, while shortly afterwards the Haifa District Court, in *Reis* v. *Thurhaus*, decided on February 23, 1954 (*ibid.*, p. 267), had accepted such an affidavit in similar circumstances. And see *Landau* v. *Borwin*, *supra*.

In a note on this case published in *Hapraklit*, vol. II (1955), p. 97, Professor N. Feinberg draws attention to the fact that neither the majority nor the minority judgments had referred to Article 12 of the Mandate for Palestine by which "the Mandatory shall be entrusted with the control of the foreign relations of Palestine . . . He shall also be entitled to afford diplomatic and consular protection to citizens of Palestine when outside its territorial limits." From that provision Professor Feinberg argues that British consuls exercised their powers in relation to Palestine in accordance with the law of Great Britain. But, following *Ahmed Shauki el Kharbutly* v. *Minister of Defence* (see *Annual Digest*, 1949, Case No. 19), the Mandate is regarded by the Israel Court as part of the law in force in Palestine, and hence of Israel, and therefore the powers of British consuls can be related to the law in Palestine, so that Israel consuls derive their power from the same source. Professor Feinberg also doubts if Judge Goitein was correct in assuming the existence of an international custom regarding the powers of consuls in the absence of a consular convention (but the question is partly semantic, as it is not clear whether the Hebrew word herein translated " practice " was used as meaning " custom " or " usage ").

Consuls—Functions of—Right to Represent Nationals in Administration of Estates—Termination of Right upon Termination of Treaty.

See p. 203 (*Petition of Mazurowski*).

III.—Privileges and Immunities of Consuls

Consuls—Immunities of—Whether Exempt from Jurisdiction of Local Courts—Submission to Jurisdiction—What Constitutes Submission.

GRISBY *v.* JUBWE AND OTHERS.

West Africa, Court of Appeal, Lagos. November 22, 1954.

(Foster-Sutton, President; De Comarmond Ag.C.J. (Nigeria) and de Coussey J.A.)

THE FACTS.—The plaintiffs (respondents herein) had brought an action in tort in the High Court of Lagos, against the defendant (the appellant herein), claiming damages occasioned, as they alleged, by the unlawful interference by the defendant with a contract of labour between the plaintiffs and Elder Dempster Lines Ltd. Before the return date of the writ of summons, the plaintiffs moved *ex parte* for an order for leave to sue in a representative capacity. The defendant attended the Court by counsel and opposed the application, but the order was made. On the return of the writ, the defendant again attended by counsel, and pleadings were ordered. The plaintiffs' statement of claim was filed on October 24, 1953, and on November 3 the defendant filed a document headed " statement of defence " in which he claimed to be exempted from the jurisdiction of the Court on the ground of diplomatic immunity by virtue of his office as the Consul for Liberia. He did not answer the allegations of fact in the plaintiffs' statement of claim. Consequently, on November 16, 1953, when the action was tried, the Court held that the defendant had submitted to the jurisdiction by not appearing under protest. The Court also held that the defence was therefore ineffectual and it awarded judgment to the plaintiffs on the ground that the averments of fact in the statement of claim must be taken as having been admitted by the defendant. The defendant appealed from this decision to the West African Court of Appeal.

Held: that the appeal must be dismissed, but that a re-trial would be ordered in view of the circumstances of the case in order to allow the defendant (appellant) to make his defence on the facts. By appearing and opposing a motion and by accepting an order for pleadings, the defendant had submitted to the jurisdiction of the Court. The question whether a Consul, as such, is entitled to diplomatic immunities did not require to be considered in view of the submission to the jurisdiction.

Coussey J.A. said, *inter alia*: " As to the . . . ground of appeal, that the Court erred in holding that there was a submission to the jurisdiction . . ., it is unnecessary to decide the point whether as Liberian Consul the defendant was exempt from the jurisdiction. As he had clearly attended the Court, both on a motion and on the return date, he had thereby submitted to the jurisdiction by opposing the plaintiffs' motion and accepting an order for pleadings . . ."

[Report: *Selected Judgments of the West African Court of Appeal*, Vol. XIV (1956), for 1952–1955, p. 637.]

Consuls—Immunity of Consular Premises—Immunity from Taxation under Treaty—Immunity in Time of War.

See p. 432 (*Brownell* v. *City and County of San Francisco*).

E—MISCELLANEOUS

Privileges and Immunities—Immunity from Jurisdiction—Military Mission of Foreign State—Mission Accredited to Allied Control Authority in Berlin—Waiver of Immunity—By Institution of Proceedings—Whether Institution of Proceedings before Courts of Occupied Country Constitutes Waiver of Immunity from Jurisdiction of Courts of Occupant.

See p. 116 (*Hartje* v. *Yugoslav Military Mission and Another*).

PART VIII

TREATIES

A—IN GENERAL

I.—Conception and Function of Treaties

Treaties—In General—Assumption of Obligations Otherwise than by Treaty.

See p. 39 (*Brownell* v. *Sun Life Assurance Company of Canada*).

II.—Forms of International Agreements: Treaties. Conventions. Governmental Agreements. Exchanges of Notes. Other Forms of Treaties

Treaties—Form of—" Treaties " and " Agreements "—The Law of Holland.

See p. 166 (*Institut national des Appellations d'Origine des Vins et Eaux-de-vie* v. *Mettes*).

B—CONCLUSION OF TREATIES

II.—Conditions of Validity of Treaties. Registration of Treaties

Treaties—Conclusion of—Treaty Not Approved by Legislature—International Law and Municipal Law—Validity of Treaties in Municipal Law—Executive Character of Treaty-Making—The Law of India.

UNION OF INDIA *v.* JAIN AND OTHERS.

India, High Court of Calcutta. August 11, 1954.

(Das Gupta and Mookerjee JJ.)

THE FACTS.—The respondents brought an action in a subordinate Court to obtain relief against the imposition of certain duties on the consumption of petrol levied by the Municipal Assembly of Chandernagore. The territory of Chandernagore, previously belonging to the French Union, was ceded to India by the Indo-French Treaty of February 2, 1951. According to Section 7 of the Treaty, all rights, liabilities and obligations of the Government of the French Republic or the Municipal Assembly or the Administrative Council in relation to Chandernagore became the rights, liabilities and obligations of the Government of India. The question arose whether the Union of India [the petitioner] could carry on in its own name the above litigation to which the *Percepteur* and Municipal *Reserveur* of Chandernagore was a party, and could present appeals in his place against the respondents. The latter contended that the Treaty of Cession had no legal validity in the absence of parliamentary legislation after its conclusion.

Held: that the Union of India had the right to prefer the appeals in its own name.

The Court said: " Even if it were assumed that this Treaty was not legally valid without parliamentary legislation, the transfer of the territory to India remains an accomplished fact which is accepted as such by both the interested parties, namely, the French Republic and the Union of India. Consequently, it would be territory comprised within the territory of India, whether or not the Treaty was legally valid.

" Making a treaty is an executive act and not a legislative act. Legislation may be and often is required to give effect to the terms of a treaty. Thus if a treaty, say, provides for the payment of a sum of money to a foreign Power, legislation may be necessary before the money can be spent; but the treaty is complete without legislation."

It was also contended that as the entering into treaties with foreign countries and the implementation of such treaties was within the competence of the Indian Parliament (see Schedule VII, List I, Entry 14, of the Indian Constitution), this was an additional reason why the Treaty, not having been approved by the Legislature, had no validity.

The Court said: " Undoubtedly, this provides for legislation in connection with entering into treaties. This cannot, however, in [our] opinion, justify the conclusion that the makers of the Constitution intended that no treaty should be entered into unless Parliament has legislated on the matter. The power of legislation on this matter of entering into treaties leaves untouched the executive power of entering into treaties. I can see no justification in principle or authority for the view that making a treaty requires legislation for its validity. The President makes a treaty in exercise of his executive power and no court of law in India can question its validity. [Our] conclusion is that when the President, in whom Article 53 of the Constitution vests all the executive power of the Union, has entered into a treaty, the municipal courts cannot question the validity of the treaty. [The Court stated that the President of India ratified the Treaty of Cession of Chandernagore, and continued:] [We] hold that . . . the territory of Chandernagore became comprised within the territory of India within the meaning of Article 243 of the Constitution. The *Regulation* that was made by the President was therefore validly made, and it has the same force and effect as an Act of Parliament applying to such territory . . . If therefore the Municipal Assembly had the right of litigation in respect of any matter immediately preceding June 9, 1952, the appointed day in the Regulation (at which the rights in the subject matter of the appeals have become vested in the Union of India), that right became the right of the Central Government of the Union of India."

[Report: A.I.R., 1954, Calcutta 615.]

VI.—Ratification of Treaties. Entry into Force

Treaties—Operation of—Ratification of Convention after Enactment of Municipal Law—Whether Law Applicable during Period Prior to Ratification—Geneva Convention of July 28, 1951, Relating to the Status of Refugees—Municipal Law Enacting Provisions of that Convention.

See *Re Ilitch*, decided by the Tribunal de Commerce de la Seine (France) on May 14, 1954, in which the plaintiff produced a certificate that he had been classified as a Yugoslav refugee by the French Office for the Protection of Refugees and Stateless Persons as evidence that he was entitled to the benefit of Article 16 of the Convention of July 28, 1951, relating to the Status of Refugees. Article 16 of that Convention provides:

" A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi*."

The Court said that the fact that the ratification of the Convention by France did not take place until March 17, 1954, after the institution of these proceedings by the plaintiff, was immaterial, seeing that France had on July 25, 1952, *i.e.*, before the institution of the proceedings, enacted a law which was intended to make the provisions of the Convention applicable as part of French municipal law. Accordingly, it was *held* that the plaintiff was entitled to the benefit of Article 16. [Report: *Sirey*, 1955, *Chronique*, p. 102.]

VII.—Operation and Enforcement of Treaties. Necessity for Municipal Legislation

[*See also* PART I, INTERNATIONAL LAW IN GENERAL: IV, Relation to Municipal Law; *and* PART VI, THE INDIVIDUAL IN INTERNATIONAL LAW: A, In General.]

Treaties—Operation of—Municipal Statute Subject to Treaty Provisions—International Convention for the Protection of Industrial Property, 1934—Patents Act, 1949—Application for Compulsory Licence.

PARKE DAVIS & CO. *v.* COMPTROLLER OF PATENTS, DESIGNS AND TRADE MARKS AND ANOTHER.

England, House of Lords. March 11, 1954.

(Lord Simonds, L.C., Lords Oaksey, Morton, Asquith and Cohen.)

THE FACTS.—Article 5 (A) of the International Convention for the Protection of Industrial Property, of June 2, 1934, provides:

"1. The importation by the patentee into the country where the patent has been granted of articles manufactured in any of the countries of the Union shall not entail revocation of the patent.

2. Nevertheless, each of the countries of the Union shall have the right to take the necessary legislative measures to prevent the abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work.

3. These measures shall not provide for the revocation of the patent unless the grant of compulsory licenses is insufficient to prevent such abuses.

4. In any case, an application for the grant of a compulsory license may not be made before the expiration of three years from the date of the issue of the patent, and this license may only be granted if the patentee is unable to justify himself by legitimate reasons. No proceedings for the revocation of a patent may be instituted before the expiration of two years from the date of the granting of the first compulsory license.

5. The foregoing provisions shall be applicable, *mutatis mutandis*, to utility models."

The appellants, a United States company, had obtained a grant of three British letters patent for a way of producing an antibiotic called chloromycetin. Within three years from the date of the grant, the second respondents, British Drug Houses, Limited, applied to the Comptroller-General of Patents, Designs and Trade Marks for a compulsory licence, under s. 41 (1) of the Patents Act, 1949, which provides that, where a patent is in force in respect of, *inter alia*, a substance capable of being used as, or in the production of, food or medicine, " the comptroller shall, on application made to him by any person interested, order the grant to the applicant of a licence under the patent on such terms as he thinks fit, unless it appears to him that there are good reasons for refusing the application."

The respondents then applied for a writ of prohibition directed to the Comptroller-General of Patents to prevent him from entertaining the application. In support of their application they relied upon s. 45 (3) of the Act of 1949, which provides: " No order shall be made in pursuance of any application under sections 37 to 42 of this Act which would be at variance with any treaty, convention, arrangement or engagement applying to the United Kingdom and any convention country." They contended that Article 5 (A) of the Convention of 1934, quoted above, was one of the international obligations attracted by this provision to all applications for compulsory licences, and that the result was to protect patentees in all cases, on whatever ground the compulsory licence was sought, for an initial period of three years.

The application for prohibition was refused by the Divisional Court, and by the Court of Appeal, and the appellants now appealed to the House of Lords.

Held: that the appeal must be dismissed. Art. 5 A (4) of the

1934 Convention related only to the prevention of abuses resulting from the exercise of exclusive rights conferred by patents. The powers of the Comptroller-General to grant a compulsory licence in respect of food and medicine under s. 41 (1) of the Patents Act, 1949, was not concerned with such abuses, and therefore not fettered by that Article of the Convention. Therefore the grant of a compulsory licence within the three years' period would not be inconsistent with treaty obligations.

Lord Cohen, after describing the relevant sections of the Patents Act, 1949, and Article 5 of the Convention of 1934, continued:—" the question at issue between the parties is whether paragraph A (4) of Article 5 applies only to licences granted under sections 37 and 40 of the 1949 Act or extends to licences granted under section 41 of that Act.

" The 1934 Convention replaced an earlier Convention signed in 1925 dealing with the same subject-matter. The first three paragraphs of Article 5 of that Convention were in the same terms as paragraphs A (1) (2) and (3) of the 1934 Convention. Paragraph (4) read as follows: ' In no case can the patent be made liable to such measures before the expiration of at least three years from the date of grant of the patent and then only if the patentee is unable to justify himself by legitimate reasons.'

" It is, I think, plain that paragraphs (2) and (3) of both Conventions are directed, and directed only, to enabling a contracting country to protect the public interest against some act or neglect of the patentee—*i.e.*, against an abuse by the patentee of his monopoly rights—and have no relation to an application under section 41 based on the character of the invention. Mr. Shelley submitted that there was no material distinction between sections 37 and 41, since in either case the Comptroller would not grant a licence if the patentee were willing to do so on reasonable terms. I am unable to accede to this argument. In a case under section 41 the willingness of the patentee to grant a licence on reasonable terms might result in the applicant accepting it and thus obviate the need for an order, but I do not think that it would deprive the Comptroller of jurisdiction to grant compulsory licences.

" If the measures referred to in paragraphs (2) and (3) of the 1925 Convention were measures to prevent the abuses of the kind referred to in section 37, it necessarily follows that paragraph (4) dealt only with the same measures, for the expression ' such measures ' can refer and refer only to the measures mentioned in paragraph (2).

" If that be so, it is plain that section 38A of the Patents and Designs Act, 1907, did not conflict with any provision of the 1925 Convention, and that a licence could have been granted under section 38A at any time after the grant of the patent. But it is said that the change of language in Article 5A of the 1934 Convention is significant enough to make paragraph A (4) embrace the case of licences under patents in respect of food and medicine.

" I agree with Jenkins L.J. that if such a change in the law had been intended, I should have expected to find plain language used to effect it. I cannot see any such plain language in paragraph A (4) of Article 5. On the contrary, the change in language is, in my opinion, such as was the inevitable consequence of introducing the two years' period of grace between the granting of the first compulsory licence and the institution of any proceedings for revocation. Moreover, the provision in paragraph A (4) that the licence may only be granted if the patentee is unable to justify himself by legitimate reasons seems to me appropriate only to an application for a licence grounded on some act or default of the patentee.

" Mr. Shelley relied strongly on the use of the words ' In any case ' with which paragraph A (4) begins. I cannot accede to the argument. Like Jenkins L.J., [1953] 2 Q.B. 48, 64, I think that the widest meaning which can be given to the phrase is ' in any case of the kind dealt with by this article.' To see what kind of case the article deals with it is necessary to look at the earlier paragraphs of it, and for the reason I have given I think it is clear that the earlier paragraphs deal only with applications for compulsory licences grounded on abuse of the monopoly. I would add that while ' in any case ' is no doubt a literal translation of ' en tout cas,' a less literal translation might more accurately have rendered the sense of the French original.

" The last sentence of paragraph A (4) seems to me to lead to the same conclusion. The revocation there referred to must, I think, be a revocation grounded on abuse.

" Mr. Shelley submitted that the very fact that section 45 (3) referred to a group of sections which included section 41, strongly supported the appellants' case, for it suggested that the grant of a licence under section 41 might be at variance with some convention. I doubt whether it is proper to construe the provisions of the Convention by reference to an Act passed eleven years after the Convention came into force, and I incline to the view that the inclusion of section 41 in the group of sections referred to in section 45 (3) is explained if section 45 (3) is construed as referring not merely to any convention existing at the date of coming into force of the Act but also to all such treaties, arrangements or engagements as might thereafter be made. It must also be noted that sections 37, 40 and 42 are all framed so as to conform with the requirements of article 5A and yet the draughtsman of the Act thought it necessary to include references to them in the section 45 (3). This suggests that if section 45 (3) was not inserted for the reason I have indicated, it was inserted *ex abundanti cautela* and not on account of any definite view as to the bearing of Article 5 of the convention on each of the sections 37 to 42.

" I cannot sum up my conclusions on the matter of construction in language better than that used by Jenkins L.J. when he said: [1953] 2 Q.B. 48, 65–6 '. . . reading Article 5 of the Convention of 1934 as a whole, and giving the best consideration I can to the various indications as to its meaning to be extracted from the language used, it seems to me that it is reasonably plain that this article is referring simply to measures, whether by way of grant of compulsory licence or revocation, to prevent abuses of monopoly rights, and has no reference at all to the special provisions of the English legislation, under which a compulsory licence may be granted in respect of substances capable of being used as food or medicine.'

" I do not find it necessary, therefore, to reach a conclusion as to how far it is permissible to have recourse to the history of the English legislation in order to construe the provisions of the convention. If it is permissible, that history would, I think, lead to the same conclusion. Whenever His Majesty's Government was party to a convention of this kind, it took steps at once to make such amendments in its patent legislation as it thought necessary to give effect to its obligations under the convention. It did so in 1938. Yet it did not introduce any time limit into the provisions of the Act dealing with compulsory licences under patents covering food and medicine (section 38A). As Morris L.J. said in the Court of Appeal [1953] 2 Q.B. 68: 'On the appellants' submissions . . . from 1938 until 1949 the legislature, having set out to embody in English law the matters agreed by the convention, entirely failed to understand the language of the Convention. If at a later date the full effect of the words had become apparent [in the sense for which the appellants contend], I should have thought that . . . in section 41 . . . there would have been some express reference to the time limitation.'

" For the reason I have given I would dismiss this appeal . . ."

[Report: [1954] A.C. 321.]

Treaties—Operation of—Effect of Annexation—Treaty Concluded by Annexed State—Outbreak of War Between Other Contracting Party and Annexing State—Whether Outbreak of War Affects Operation of Treaty.

HELLER *v.* LA SOIE DE PARIS.

France, Tribunal de Commerce of the Seine. November 12, 1954.

THE FACTS.—The plaintiff, an Austrian citizen, brought an action against the defendants, a French company. The defendants applied for security for costs, contending that the Franco-Austrian Treaty of March 4, 1925, which exempted Austrian citizens in France (and French citizens in Austria) from the requirement of providing security for costs, had lapsed by reason of the state of war which was alleged to have existed between France and Austria while the latter country formed part of the German Reich, and that, furthermore, there was no evidence before the Court that French citizens were exempt from the requirement of providing security for costs in proceedings before Austrian courts.

Held: (i) that, according to a letter received from the French Ministry of Foreign Affairs, there was no state of war between Austria and France; (ii) that the Moscow Declaration of 1943, by which the Allied Powers undertook to restore the independence of Austria, showed an intention on the part of the Allied Powers not to regard Austria as an enemy State, and that the Treaty accordingly continued to apply; (iii) that the wording of the Treaty was clearly such as to grant exemption to the nationals of the Contracting Parties, and that there was therefore no need to prove that French citizens were exempt from the requirement of providing security in proceedings before Austrian courts.

The Court said: " The defendant Company contends that the Treaty on Judicial Assistance concluded between France and Austria on March 4, 1925, on which the plaintiff relies in claiming exemption from the requirement of security for costs, has lapsed by reason of a state of war between the High Contracting Parties and that it cannot apply in the present case because it has not been put into operation again. The defendants further contend that even if the Treaty is still in force, it would not follow that it applies in the present case, because the plaintiff has not proved that French citizens in Austria are not—in a similar case—subject to the requirement of providing security. In the further alternative, the defendants contend that the plaintiff, who is not resident in France, cannot rely on the Treaty, which is said to be applicable only to Austrian citizens resident in France. With regard to the first contention, a letter from the Ministry of Foreign Affairs of October 9, 1954, states that Austria is not in a state of war with France. It further states that the four Signatory Powers of the Declaration of Moscow of October 1943 undertook to restore the sovereignty and independence of Austria, and evinced an intention not to regard that country as an enemy State by concluding with it a ' Traité d'État ', and not a Peace Treaty. It follows that though the Treaty of March 4, 1925, may have been suspended as a result of the annexation of Austria by the Third Reich, this is no longer the case since the Declaration of Moscow. There was therefore no need for the Treaty to be ' put into force again '. It follows that the first contention is ill-founded and must be rejected.

" With regard to the second contention, Article 2 of the Treaty provides that ' the nationals of one of the High Contracting Parties who are concerned in legal proceedings in the courts of the other High

Contracting Party, as principal plaintiffs or intervening parties, shall not be liable for any duty, security or deposit for which that Party's own nationals would not be liable in similar circumstances.' This provision, which is no more than the application to a special situation of the general principle contained in Article 1 of the Treaty, which confers on the nationals of the signatory countries ' in all matters of judicial assistance ' the ' same rights and benefits as are accorded to nationals ', can only be interpreted as according to the plaintiff, who is an Austrian citizen, the same rights and benefits as are enjoyed by a French citizen in similar circumstances. The second contention is therefore ill-founded and must also be rejected.

" With regard to the third contention, the Treaty of March 4, 1925, does not contain any restrictive provision—as is alleged by the defendants—to the effect that the benefit on which the plaintiff relies can be claimed only by plaintiffs of foreign nationality who are resident in the country of the defendant. It follows that the third contention is also ill-founded and must be rejected. The plaintiff is accordingly entitled to rely on the Treaty of March 4, 1925, and is exempt from the requirement of providing security for costs."

[Report: *Clunet*, 82 (1955), p. 166.]

Treaties—Operation and Enforcement of—Relation to Municipal Law—Treaties Conflicting with National Constitution—The Law of Switzerland.

VARINI *v.* PAOLETTI.

Switzerland, Federal Tribunal. May 12, 1954.

THE FACTS.—In 1943 the Choisy watch factory, of Locarno, of which the appellant was sole director, sold to the respondent, resident in Livorno (Italy), a number of watches for 6,000 Swiss francs. The respondent paid the purchase price through international clearing in April 1949, but refused to pay 5 per cent. moratory interest from the date of delivery to the date of payment. In 1950 the appellant sued the respondent for this interest before the Court of first instance at Livorno. The respondent made a counterclaim based on the lower value of the goods delivered. On April 27, 1953, the Court decided that the respondent was to pay some 673 Swiss francs to the appellant as moratory interest, but ordered the appellant to pay 3,648 Swiss francs to the respondent for lower value of the goods. That decision was not appealed against.

In December 1953 measures for the enforcement of the decision were taken in Locarno. The appellant appealed to the Court of Appeal of the Canton of Tessin, which on February 11, 1954, held that the judgment of the Court of first instance of Livorno was enforceable in Switzerland, by virtue of a Convention of January 3, 1933, between Switzerland and Italy concerning the recognition and enforcement of judgments. The appellant now appealed to the Federal Tribunal on the ground, *inter alia*, that the decision of the Court below was a violation of Article 59 of the Federal Constitution which provides that a debtor must be sued before the court of his domicile.

Held: that the appeal must be dismissed.

The Court said: " The Tribunal is asked to quash the Cantonal decision on the ground that it violates Article 59 of the Federal Constitution. However, that constitutional guarantee cannot be invoked by the appellant. The Convention between Italy and Switzerland of January 3, 1933, lays down the conditions on which an Italian decision in civil or commercial matters may be recognized or enforced in Switzerland. The provisions of that international Treaty, ratified by the Federal Assembly, bind the Federal Tribunal (Article 113, para. 3, of the Federal Constitution). They must accordingly be applied even when they are in conflict with Article 59 of the Federal Constitution."

[Report: *Arrêts du Tribunal fédéral Suisse*, vol. 80 (1954), I, p. 200.]

Treaties—Operation of—Relation to Municipal Law—Absence of Incorporation into Municipal Law—Enforcement of Treaties in Municipal Courts—The Law of Sweden—Foreign Confiscatory Decrees—Absence of Effect in Respect of Property in Sweden—Sovereign Immunity—Right to Sue—Foreign States.

BULGARIAN STATE *v.* TAKVORIAN.

Sweden, Supreme Court. June 9, 1954.

THE FACTS.—On July 17, 1942, a Treaty of Commerce was concluded between Sweden and Bulgaria, by which the two Governments declared themselves prepared to allow the export and import of certain types of goods. The exchange of goods was to take place on the basis of private transactions exclusively. By an Additional Protocol of the same date, and constituting an integral part of the Treaty of Commerce, it was agreed that certain types of Bulgarian goods, including leaf tobacco, were to be imported against Swedish goods of specified kinds. Payment for the goods of the classes enumerated in the Additional Protocol was to be effected in the following manner: The Bulgarian goods imported into Sweden were to be paid for by the Swedish buyer to an account in Swedish crowns opened at the Swedish National Bank (Sveriges Riksbank) in the name of the Clearing Board at Stockholm, for the benefit of the Bulgarian National Bank. The Bulgarian exporters were to be paid, by the latter Bank, amounts of Bulgarian leva corresponding to the amounts paid to the aforementioned account. The Swedish goods imported into Bulgaria were to be paid for by the Bulgarian importers to the

Bulgarian National Bank. The Bank was to inform the Swedish Clearing Board about such payments, and the Board, in its turn, was to make the corresponding payments, in Swedish crowns, from the aforementioned account. In addition, the Swedish National Bank and the Bulgarian National Bank were to inform each other about payments made to them in accordance with the provisions of the Additional Protocol.

On June 30, 1943, the Swedish Tobacco Monopoly (Aktiebolaget Svenska Tobaksmonopolet) bought, within the framework of the Treaty, from T. H. Takvorian, whose firm in Sofia bore his name, a consignment of tobacco, worth altogether about 305,588 Swedish crowns. Delivery was completed on June 30, 1944. Having paid some 73,740 crowns, and availing itself of the procedure laid down in a Swedish Law of March 24, 1927,[1] the Monopoly placed the remainder of its debt, some 231,848 crowns, on public deposit with the competent authority (*Överstathållarämbetet*) in Stockholm, on the ground that it could not reasonably be required to determine to whom payment for the consignment should rightly be made. It stated further that Takvorian, who was the owner of the firm when the purchase was made, had communicated from Geneva, where he was now domiciled, with the Monopoly, requesting that the amount due to him should not be paid to the clearing account but should be transferred to Switzerland or paid to a special account in his favour in a Swedish bank. At the same time, the Bulgarian Legation in Stockholm, at the request of the Bulgarian National Bank which had also sent cables direct to the Clearing Board and the Monopoly, announced its interest in the money. The Legation considered itself competent to speak on behalf of the Bulgarian firm of Takvorian, and referred to the Agreement of 1942 which, in its opinion, laid down that payment was to be made through the Clearing Board. In the circumstances, Takvorian had informed the Monopoly that for the moment he did not require payment of the money, which could consequently remain with the Monopoly for the time being. On November 3, 1947, the Bulgarian National Bank requested the Överståthållarämbetet in Stockholm to pay the deposited sum on its behalf to the Clearing Board.

By a decision of November 11, 1947, the Överståthållarämbetet rejected this request, on the ground that the circumstances which would give them the right under Article 6 of the Law of 1927[2] to pay the amount to the Bulgarian National Bank, did not exist.

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[1] Article 1 of this Law provided that if a debtor does not know who his creditor is, and if his ignorance is excusable or if there is uncertainty as to which of several persons is the right creditor, and the debtor cannot reasonably be required, at his own risk, to determine to whom payment should be made, he may fulfil his obligation to pay the amount due by depositing it with the Överståthållarämbetet for the creditor's account.

[2] This Article read: "When deposit has been caused by uncertainty as to which of two or several persons is the right creditor, the Överståthållarämbetet must not pay the amount deposited to any one of them, until it has been finally determined, by judgment in proceedings instituted by one of them against the other or others, by agreement or otherwise, who is the rightful creditor."

After it had completed the deliveries to the Monopoly, the firm of Takvorian had been declared State property in Bulgaria. Takvorian in due course applied to the Överståthallarämbetet for permission to withdraw the money and accrued interest, provided that within one year no other claimant instituted proceedings in a Swedish court contending that he had a better right to the deposited sum. On the basis of this proviso, the Överståthållarämbetet decreed that Takvorian was entitled to the sum of 231,848 crowns and accrued interest, it being understood that it was to be paid to the Swedish National Bank to be disposed of by the Bank in accordance with the provisions of the Additional Protocol to the Commercial Treaty. A disposal of the amount in favour of the Bulgarian National Bank could, however, take place only upon that Bank having placed at the disposal of Takvorian in Bulgaria a sum in Bulgarian currency corresponding to the amount deposited, plus accrued interest. This decree was ordered to be published, and a copy of it sent to the Foreign Office for transmission to a competent representative of the Bulgarian State.

The Överståthållarämbetet said: " The object of the claim considered in the decision of November 11, 1947, must be assumed to have been that the deposited sum was to accrue finally to the Bulgarian State by virtue of the nationalization of the firm of Takvorian. The nationalization cannot, however, be given legal effect as regards property which, like the property in this case, is to be regarded as being in Sweden. On the evidence available, and as against the Bulgarian State, Takvorian must consequently be regarded as the lawful creditor. No one else has claimed to be entitled to the deposited sum as creditor.

" Owing to the procedural immunity that a foreign State enjoys in Swedish law, Takvorian cannot be regarded as having been able to institute proceedings against the Bulgarian State to prove a better right to the sum deposited. For this reason, the circumstance that the question who is the rightful creditor has not been finally determined by judgment in a lawsuit or otherwise, does not in itself prevent the payment of the sum to Takvorian, but before such payment is effected an opportunity should be given to anyone considering himself to have a better right to the money to institute proceedings in a Swedish court.

" As regards the manner in which the sum is to be paid to Takvorian, it must be noted that the delivery [of tobacco] in question took place within the framework of an Agreement reached between the Swedish and Bulgarian Governments, and prescribing payments through a clearing arrangement. The available evidence offers no possibility of determining whether the contract which had been concluded between the Monopoly and Takvorian assumed that payment was to be effected in accordance with the provisions of the

Additional Protocol, or whether the provisions mentioned were to be regarded as not binding upon the various purchasers. As Takvorian had not proved himself to be entitled to dispose of the amount outside the clearing arrangement, the sum may be paid to Takvorian —provided that no such proceedings are instituted as have been mentioned above—only by its being paid to the Swedish National Bank, to be dealt with by the Bank in accordance with the provisions of the Additional Protocol. However, in view of the competing claim raised by the Bulgarian National Bank, a disposal of the amount in favour of that Bank may be effected only after it has placed at the disposal of Takvorian in Bulgaria a sum in Bulgarian currency corresponding to the sum deposited."

On appeal from the decision of the Överståthallarämbetet to the Court of Appeal of Svea, it was held (i) that the order must be modified to the effect that—unless proceedings as aforementioned were instituted—the sum deposited, with accrued interest, should be paid to Takvorian upon request; it being understood, however, that payment must not take place without the permission required under the then existing currency legislation; and (ii) that a copy of the decision of the Court should be sent to the Foreign Office for transmission to a competent representative of the Bulgarian State.

The Court said: " Since the order appealed against has acquired a certain legal force, it follows that, unless some other person institutes proceedings in a Swedish court within one year, claiming a better right to the deposited sum, Takvorian is entitled to receive the amount and accrued interest. Thus, only the question of the manner in which the payment is to take place is under consideration in this Court of Appeal.

" It is true that the deliveries of tobacco were made within the framework of an Agreement concluded between the Swedish and Bulgarian Governments and prescribing payment through a clearing arrangement. However, the provisions of the Agreement—which has not been followed by a decree under the Law of February 16, 1934, concerning the fulfilment in certain cases of payment obligations in relations with foreign countries[1]—cannot be regarded as in themselves binding upon the various buyers and sellers of the goods mentioned in the Agreement. Consequently, the Monopoly is not bound under the Agreement to make payment through the clearing arrangement.

" In its application for permission to deposit the money, the

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[1] Article 1 of this Law provides that, in so far as it is regarded as necessary for the maintenance of a balance of payments (clearing), the King may, in cases in which the right to dispose of currency has been limited in a foreign State, order that anyone who is under an obligation to pay for goods received from that State, shall fulfil this obligation—if a clearing agreement has been concluded with the foreign State—by paying the amount due, on the conditions stipulated in the agreement, to the Swedish National Bank or some other bank or institution that the King may designate.

Monopoly has not suggested that it was of importance to itself on any other ground that payment should be effected through the clearing arrangement. For this reason, and since Takvorian has now claimed that the deposited sum and accrued interest should be paid to him, the Court of Appeal finds that—unless proceedings as aforementioned are instituted—Takvorian ought to be paid the amount and accrued interest in the manner requested by him. [Takvorian had requested that the Court of Appeal should give him the right to receive the sum in Sweden, and in Swedish currency.] Since Takvorian is domiciled abroad, payment must not take place without permission given in conformity with the present currency laws."

While concurring in the majority opinion of the Svea Court of Appeal, two Judges dissented on the ground that they found it established that it was implied in the contract between Takvorian and the Monopoly that payment should be made through the clearing arrangement.

On further appeal to the Supreme Court, on the question whether the Bulgarian State had the right to bring an action in the Swedish courts to enforce a clearing agreement and, in consequence, to appeal against the decision of the Court of Appeal,

Held (unanimously): that such an appeal would lie and that it must succeed. The decision of the Court of Appeal was rescinded, and the original order of the Överstathållarämbetet confirmed.

I. On the procedural question as to whether the Bulgarian State was entitled to appeal, individual opinions were delivered by Söderlund and Lind JJ. Judge Söderlund said: " One of the questions in dispute seems to have been in what manner public authorities may appeal to courts of law in matters relating to the observance of existing provisions relating to clearing arrangements. [In principle, the learned Judge saw no objection to allowing Swedish authorities to institute proceedings to this end, but he found that on the whole the relevant statutes had chosen the simpler way of providing the clearing authority with the right to impose penalties and fines and to issue subpoenas. He discussed the question whether Swedish authorities should be allowed to intervene in a private law dispute concerning payment and to demand the observance of provisions relating to clearing arrangements. Although he did not wish to express a definite opinion, he could see reasons for an answer in the affirmative. He then proceeded to discuss the position of a foreign State, and said:]

" Apart from an express provision of law or treaty, it cannot be assumed that a foreign State or any of its organs is entitled to institute proceedings in a Swedish court to satisfy a foreign public interest. The circumstances may be such, however, that the case appears to concern a claim of property (' private ') right, and if a sufficient connection with Sweden exists the claim may be dealt with in such cases. [The learned Judge here cited a case already decided by the Supreme Court (reported in *Nytt Juridiskt Arkiv*, 1942, p. 389), and went on to discuss the question whether Takvorian was entitled to receive the sum deposited without regard to the provisions of the Additional Protocol. He examined the system of payments prescribed by that Protocol, and continued:] Approval of the claim for payment outside the clearing arrangement would [thus] lead to a deficit in the corresponding amount in the account at the National Bank, a circumstance which, it must be assumed, would be liable to be detrimental to Swedish exporters and, in the last resort, to the Bulgarian National Bank. In my opinion, there can be no question in such a situation of denying to the Bulgarian State the right of claiming, in a case of deposit, that the provisions of the Additional Protocol shall be observed."

Judge Lind stated that it was doubtful whether a foreign State could intervene in an action concerning the duty of a Swedish debtor to pay a foreign creditor through a clearing arrangement and submit arguments to the effect that payment should be made through the clearing arrangement. The learned Judge discussed in some detail whether such a claim of the foreign State could possibly be asserted on the basis of civil law. In this connexion he expressed the view that the Swedish clearing authority could not make claims of that nature. In his opinion, this circumstance supported the conclusion that Swedish legislation concerning clearing arrangements did not have the effect of creating in favour of the foreign State a claim under civil law and of such a nature that it could be asserted against the Swedish debtor in a lawsuit. He continued:

"In my opinion, it is, on the contrary, exclusively a question of a public law relation between the State of the creditor and Sweden. The interests arising in the State of the creditor on account of the clearing agreement between the States concerned must be presumed to be satisfied by the Swedish courts and authorities being under an obligation, regardless of the attitude of a private party, to apply the clearing regulations. It should be emphasized that the Swedish clearing authority is bound to enforce—by means of subpoenas—payment through clearing arrangements. In doing this, the clearing authority acts also in the interest of the State of the creditor. In the last resort, it remains for the State of the creditor to seek satisfaction from the Swedish Government through diplomatic negotiations."

Judge Lind then discussed at some length whether the foreign State could claim, not in an ordinary civil law suit but in a proceeding following an application for permission to place money on public deposit, that payment should be made through the clearing arrangement. He answered this question in the negative. While the preceding discussion had had regard to the clearing arrangement in relation to a foreign State, as it normally existed on the basis of a clearing agreement and a decree issued in accordance with the Law of February 16, 1934, the fact in the present instance was that the King had not issued a decree, nor had the clearing agreement been brought to public knowledge. Thus, there was no rule of law which created a duty for the Monopoly to pay Takvorian through clearing. A contention that the Monopoly must pay through clearing must be based, therefore, on the view that the contract between the Monopoly and Takvorian included, as an implied term, this mode of payment. On this point the learned Judge said:

" In order to accomplish a commercial transaction the importers and exporters concerned could not, in fact, do otherwise than abide by the agreement. This was especially true of the Tobacco Monopoly, which was an enterprise partly owned by the Government, and which was also aware of the clearing agreement. It must be assumed, therefore, that the Monopoly intended to use the clearing arrangement in the same manner as if the Law of 1934 had been applicable."

Judge Lind then stated that the reason for denying the State of the creditor the right to claim payment through clearing, in proceedings following an application for permission to put money on public deposit, namely, that the clearing authority was in a position to force the debtor by subpoenas to pay through the clearing, was not valid for a clearing which had not been combined with a decree issued under the Law of 1934. For this reason, the contract between the Monopoly and Takvorian seemed, in accordance with the intentions of the justices, to create a right for the Bulgarian State to make a claim in a case such as the present. The learned Judge noted also that no objection had been raised as to the right of the Bulgarian State to make the claim.

II. On the merits of the case, the Court said: " As no one but Takvorian has instituted proceedings in a Swedish court, within the time-limit prescribed by the *Överståthållarämbetet*, claiming a better right to the sum deposited, it is clear that Takvorian is entitled to receive it. Thus, only the question as to the manner in which the payment is to be made is under consideration.

" In the letter to the *Överståthållarämbetet* in which the Monopoly announced the deposit, it was stated that the purchase had been effected within the framework of the Treaty of Commerce of 1942 . . . and that, according to . . . the Additional Protocol . . . payment was to be made through the prescribed clearing arrangements. Takvorian made a statement to the same effect in the letter in which he requested the Administrator to allow him to withdraw the sum deposited. The purchase must consequently be presumed to have been made upon the assumption that the provisions in the Additional Protocol regarding payment were to be observed, a view that finds further support in other evidence produced."

[Report: *Nytt Juridiskt Arkiv*, 1954, p. 268.]

NOTE.—The above case is commented upon by Hjerner, *Främmande Valutalag och Internationell Privaträtt* (1956), at pp. 182 ff, 255 ff, and 373.

In a subsequent action, the Bulgarian State, invoking primarily the above judgment of the Supreme Court, applied for a declaration that the purchase must be assumed to have been made on the condition that the provisions of payment in the Additional Protocol were to be observed. It also applied for payment to be made to the Swedish National Bank in the manner prescribed in the previous judgment. The *Överståthållarämbetet*, finding that the Bulgarian State had not even claimed to be competent to represent Takvorian in this matter, and that the question as to payment of the sum deposited did not concern the Bulgarian State or its rights, did not examine the merits of the petition. An appeal from the decision of the Överståthållarämbetet to the Court of Appeal was dismissed, and the Supreme Court refused leave to appeal further: *Bulgarian State* v. *Takvorian*, decision of August 25, 1955 (*Nytt Juridiskt Arkiv*, 1955, C 682. *Cf.* Hjerner, *op. cit.*, p. 373).

Treaties—Operation of—Treaties Not Incorporated as Part of Municipal Law—Interpretation of Treaties—Liberal Interpretation—Primacy of Municipal Law—The Law of India.

SHARMA *v.* STATE OF WEST BENGAL AND OTHERS.

India, High Court of Calcutta. February 11, 1954.
(Guha and Guha Ray JJ.)

THE FACTS.—The petitioner made two applications for the issue of a writ in the nature of *habeas corpus* in favour of two traders detained under the Preventive Detention Act, 1950. The Order of detention was made to prevent them from acting in a manner prejudicial to the maintenance of supplies and services essential to the community, and particularly to prevent them from exporting goods from India to Tibet. The petitioner contended that in view of the provisions of the Anglo-Tibetan Trade Regulations of 1914, which were binding on India, the export of goods from India to Tibet and vice versa did not constitute an offence justifying detention.

Held: that although the freedom of Indo-Tibetan export and import trade (except trade relating to prohibited articles such as arms, ammunition, etc.) may be inferred from the provisions of the Anglo-Tibetan Trade Regulations of 1914, the relevant treaty obligations cannot be enforced in the municipal courts of India, which must obey the overriding laws of the Indian Legislature.

The Court said: " In 1913 a conference of British, Chinese and Tibetan Plenipotentiaries was convened in Simla to negotiate an agreement regarding the international status of Tibet, and a tripartite Convention was drawn up and in 1914 initialled by the representatives of the three Parties . . . The Chinese Government refused to ratify the Convention. It was, however, ratified by Great Britain and Tibet and accepted as binding by them as between themselves. By Article 7 of this Convention, the Tibetan Trade Regulations of 1893 and 1908 were cancelled and the Tibetan Government undertook to negotiate with the British Government new trade regulations. In pursuance of this undertaking, the Anglo-Tibetan Trade Regulations of 1914 were signed . . . Clause VIII of these Regulations is very important for our present purposes. It runs thus:

'VIII. Import and export in the following articles: Arms, ammunition, military stores, liquors and intoxicating and narcotic drugs may at the option of either government be entirely prohibited or permitted only on such conditions as either government on their own side may think fit to impose.'

According to [the petitioner] the implication of this clause read with the other clauses is that freedom of export and import of other commodities between India and Tibet was guaranteed.

" Clause IX which dealt with the period of currency of the regulations may also be quoted. It runs thus:

'IX. The present regulations shall be imposed for a period of ten years reckoned from the date of signature by the two Plenipotentiaries; but if no demand for revision be made on either side within six months after the end of the first ten years, the regulations shall remain in force for another ten years from the end of the first ten years; and so it shall be at the end of each successive ten years.'

" According to [the petitioner] the Regulations of 1914 are still operative in terms of the above clause, there having been no revision yet.

" From August 15, 1947, the Partition of India became operative, and by the Indian Independence Act, 1947, passed by the British Parliament two Independent Dominions, *viz.* India and Pakistan, came into existence.

" In exercise of the powers conferred upon him by s. 9 of the Indian Independence Act, 1947, and of all other powers enabling him in that behalf, the Governor-General promulgated on August 14, 1947, the Indian Independence (International Arrangements) Order, 1947. The schedule to this Order recorded an agreement as to the devolution of international rights and obligations upon the Dominions of India and Pakistan. Clause 3 (1) of the schedule laid down that rights and obligations under international agreements having an exclusive territorial application to an area comprised in the Dominion of India will devolve upon that Dominion."

As to the interpretation of the Anglo-Tibetan Trade Regulations, the Court said: " The primary rule is that a treaty has to be literally construed so as to carry out the intention and purpose of the contracting parties thereto . . . In the interpretation of international agreements it is often necessary to adopt a more liberal method of construction than that which might be fairly applied in the case of private instruments. Reading the various clauses of the Regulations and bearing in mind the background of the circumstances in which they came to be negotiated, it would be somewhat surprising to suppose that the High Contracting Parties confined their attention to only a few articles of trade, *viz.* arms, ammunition, military stores, liquors and intoxicating or narcotic drugs (*vide* clause VIII) and left other and commoner articles of merchandise, *e.g.* clothing, foodstuffs, etc., entirely unprovided for. It would seem to be more rational to infer that, as regards the latter articles which were not specifically mentioned, free and unfettered commerce was intended.

"Assuming that the Anglo-Tibetan Regulations of 1914 make it obligatory on the part of India to observe their terms scrupulously during the period of their currency and to ensure free export out of India to Tibet of articles not specifically mentioned in clause VIII, several questions arise for decision. One of these questions is whether a municipal court or, for the matter of that, an Indian Court is competent to enquire into a matter involving the construction of treaties, and a connected question is whether treaty obligations can be enforced in municipal Courts. [After citing *Walker* v. *Baird* ([1892] A.C. 491) the Court continued:] According to English law, international agreements to which Great Britain may be a party and obligations arising therefrom will not be regarded as part of the ordinary law of the land, except in so far as they may have received the assent of the Legislature."

[After quoting further decisions the Court referred also to Oppenheim's *International Law*, 6th edn. (vol. I), pp. 929–30 and said:] "It is pointed out there that as International Law is primarily a law between States only and exclusively, treaties as a rule can have effect upon States only, though it is also stated that this rule can be altered by the express or implied terms of the treaty, in which case its provisions become self-executory. It would seem from a consideration of the above authorities that the general principle is that though municipal courts are competent to enquire into matters involving the construction of treaties and other acts of State, treaty obligations cannot be (directly) enforced in municipal courts . . . From this standpoint the present petitions are not entitled to succeed."

As to the significance for the present case of the Indian Independence (International Arrangements) Order, 1947, the Court said: "Considering all the circumstances we are not inclined to read more into the Indian Independence (International Arrangements) Order, 1947, than what is expressly stated therein and we are unable therefore to uphold the [petitioner's] contention that it conferred . . . any rights upon the citizens of India against their Government flowing from the Anglo-Tibetan Trade Regulations . . .

"Assuming that according to the Anglo-Tibetan Trade

Regulations of 1914 free export to Tibet (out of India) of articles not specifically referred to in clause VIII was permitted, it does not appear that, so far as Indian citizens are concerned, it received statutory recognition and became part of the municipal law of India. There is an apparent repugnance between the implied provision of the Anglo-Tibetan Trade Regulations, 1914, permitting free trade between the two countries, on the one hand, and the subsequent Indian Statutes, *e.g.* the Essential Supplies Act, 1946, and the numerous orders issued thereunder . . . putting restrictions on such free trade, on the other, and it is not easy to reconcile the divergent sets of provisions.

"The language of the Indian Statutes is clear enough: in the interests of India, they seem to put restrictions in the way of trade between India and other countries. If that language be in conflict with any principle of international law as is said to be deducible from the implied provisions of the Anglo-Tibetan Trade Regulations of 1914, the municipal courts of India have got to obey the laws passed by the Legislature of the country to which they owe their allegiance. In interpreting and applying municipal law, these courts will try to adopt such a construction as will not bring it into conflict with rights and obligations deducible from rules of international law. If such rules or rights and obligations are inconsistent with the positive regulations of municipal law, municipal courts cannot override the latter. It is futile in such circumstances to seek to reconcile, by strained construction, what is really irreconcilable."

[Report: A.I.R., 1954, Calcutta 591.]

Treaties—Operation of—Direct Operation of Treaties in Relation to Individuals.

See p. 3 (*Public Prosecutor* v. *J. de B.*).

Treaties — Operation of — Application to Non-Metropolitan Territories.

See p. 210 (*Pimea Ltd.* v. *Kündig*).

Treaties—Operation and Enforcement of—Order of Priority as between Treaties and Municipal Law—The Law of France.

See p. 1 (*Allahverdi* v. *Lanauze*).

Treaties—Operation and Enforcement of—Supremacy of Prior Municipal Law.

See p. 168 (*Deportation* (*Greece*) *Case*).

Treaties—Operation of—Treaties Not Approved by Legislature—Validity of—The Law of India.

See p. 256 (*Union of India* v. *Jain and Others*).

C.—TERMINATION OF TREATIES

II—By Act of Party

iii.—Unilateral Denunciation. Result of Non-performance by the Other Party

Treaties—Termination of—Unilateral Denunciation of Rhine Navigation Convention by Germany in 1936—Application of the Convention as between Other Parties—Suspension of Treaty during the Second World War—Restoration of the Treaty.

NEDERLANDSCHE RIJNVAARTVEREENIGING *v.* DAMCO SCHEEPVAART MAATSCHAPPIJ.

Holland, District Court of Rotterdam. January 14, 1954.

THE FACTS.—In *Swiss Corporation Tanutra* v. *N.V. Nederlandsche Rijnvaartvereeniging* (see *International Law Reports,* 1953, p. 164), the same Court, on April 17, 1953, had *ex officio* declared itself not competent to adjudicate on a claim for damages arising out of a collision which had taken place on the Rhine near Cologne after the British High Commissioner for the Western Zone of Germany had reinstated the Rhine Navigation Courts. In the present case the collision had taken place at a point between the bridges across the Rhine at Mainz near the *thalweg* of the river which was the boundary line between the United States and the French Zones of Occupation. The date of the collision was April 1, 1946. The claim for damages was presented on November 6, 1948. During 1946 and 1947 the United States and the French authorities had reinstated the Rhine Navigation Courts in their respective Zones. It does not appear that either party raised the issue of jurisdiction. However, the Court raised the matter *ex officio.*

Held: that the Court's decision in the *Tanutra* case be adhered to and that, therefore, the Court was not competent to adjudicate in this action.

The Court said: "In November 1936 the German Government denounced the Revised Convention of Mannheim of 1868 concerning Navigation on the Rhine [hereinafter called the Rhine Convention] and dissolved the German Rhine Navigation Courts. Since the Rhine Convention is a treaty which cannot be denounced unilaterally, no legal consequences could, therefore, according to international law, follow from such denunciation. In the Netherlands the Convention remained in full force. With regard to Germany it could, as a consequence of the dissolution of the German Rhine Navigation Courts, no longer be observed by the other States. Germany was henceforth not in a position to demand that the other States should apply the provisions on jurisdiction laid down in Articles 33, 34 and 35 of the Rhine Convention in connection with collisions occurring on the Rhine in Germany. These provisions with regard to Germany remained in force *de jure*, but they could no longer be observed *de facto*. After 1936, the Netherlands courts applied to such collisions the provision concerning competence *ratione materiae* laid down in Article 543 of the Netherlands Commercial Code. This was a provisional solution fully justified by Germany's illegal acts. The multilateral Rhine Convention, which had always remained in full operation between the Netherlands and Belgium, France and Switzerland had, as far as the legal relations between the Netherlands and Germany were concerned, been suspended, according to generally recognized principles of international law, by the outbreak of war between the Netherlands and Germany on May 10, 1940. That suspension must be deemed to have ended in the autumn of 1945. At that time all the Governments concerned promoted by their words and acts the restoration of the use of the Rhine for commerce within the scope of the Rhine Convention. Since the autumn of 1945 the Rhine Convention again completely regulated navigation on the Rhine between the Netherlands and the Occupying Powers which then exercised the sovereignty of the German State. In the course of the years 1946 and 1947, these Occupying Powers established courts which could fulfil the task which the Rhine Convention imposed on the navigation courts envisaged by it. The present collision took place at a time when navigation on the Rhine was once more controlled by the Rhine Convention save for the fact that the functions allotted to the courts constituted by the Convention could not yet be exercised. This was, however, possible by the time the writ of summons was served in the present proceedings. In these circumstances there is no reason why the interim solution based on Article 543 of the Commercial Code should take priority over the time-honoured regulation of the jurisdiction of the Rhine Navigation Courts."

[Report: *Tijdschrift*, vol. I, p. 330.]

NOTE.—After having declined jurisdiction, the Court, at the request of both parties, stated its finding in the case as an *obiter dictum*, which the parties accepted.

D—INTERPRETATION OF TREATIES

I.—Agencies of Interpretation

Treaties—Interpretation of—Agencies of Interpretation—Treaty Affecting Individuals—Interests of Individuals a Question of " International Public Policy "—Whether Judiciary or Executive Competent to Determine Such Question—The Law of France.

ESTADES *v.* FRENCH GOVERNMENT.
France, Cour de Cassation. January 19, 1954.

THE FACTS.—Article 4 of the Franco-Spanish Treaty of January 7, 1862, provides that Spanish nationals in France shall be exempt from requisitions. A motor lorry owned by the appellant, a Spanish national, was requisitioned by the French Forces of the Interior in 1944, and the appellant was paid compensation in accordance with the provisions generally applicable to requisitions. He contended that the compensation was inadequate because he, as a Spanish national, was exempt from all requisitions by virtue of Article 4 of the above-mentioned Treaty, which, in accordance with Article 26 of the French Constitution, took precedence over French municipal law.[1] The French Government contended that, while it was true that according to Article 26 of the Constitution treaties took precedence over French municipal law, such matters contained in treaties as were concerned with " international public policy " (*ordre international public*) had to be determined by the French Government and not by the courts, and that as the French Government had decided that all aliens in France were liable to requisitions of property, that decision was binding on the courts.

Held: that the contention of the French Government must be upheld and the appeal dismissed.

The Court said: " The judgment of the Court of Appeal [of Riom] states that the Minister for Foreign Affairs, whose opinion was solicited by the Conseil d'État in a similar matter,[2] notified the Minister of War ' that according to the view constantly expressed by his Department there is at present no treaty which exempts aliens in France from requisitions [of property], and that the term ' requisition ' in certain treaties, and more especially in Article 4 of the Franco-Spanish Treaty, signifies only requisitions of personal services, and not requisitions of property '. The Court of Appeal was right in declaring the requisition of the appellant's lorry to be valid, on the ground that the courts are bound to comply with the interpretation adopted by the French Government of an international agreement in so far as the latter, as in the present case, raises a question of international public policy, and that the Constitution of 1946 does not prohibit such interpretation by the Government. The judgment under appeal is therefore legally justified."[3]

[Reports: *Sirey*, 1954, *Jurisprudence*, Part I, p. 168; *Clunet*, 81 (1954), p. 753.]

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[1] Article 26 provides as follows; " Diplomatic treaties duly ratified and published have the force of law even if contrary to French municipal statutes, without the need for any legislative measures other than those required to ensure their ratification ".

[2] The Court here appears to have in mind the case of *Sanchez* v. *Tixier and Others: Sirey*, 1953, *Jurisprudence*, Part I, p. 185.]

[3] See also the judgment of the Court of Montpellier of February 10, 1953, in *Ministère Public* v. *Puig*: *Dalloz*, 1953, *Sommaires*, p. 64.

Treaties—Interpretation of—Agencies of Interpretation—Treaty Establishing Organization for European Economic Co-operation —International Organizations—Immunity from Local Jurisdiction—Whether Claim of Immunity to be Determined by Judiciary or Executive—Action Relating to Land Owned by International Organization.

PROCUREUR GÉNÉRAL OF THE COURT OF CASSATION *v.* SYNDICATE OF CO-OWNERS OF THE ALFRED DEHODENCQ PROPERTY COMPANY.

France, Cour de Cassation. July 6, 1954.

THE FACTS.—The respondents were the owners of certain real property adjoining a piece of land owned by the Organization for European Economic Cooperation (O.E.E.C.). O.E.E.C. began the construction of some office buildings on their piece of land, whereupon the respondents alleged that as owners of the adjacent piece of land they were entitled to an easement precluding anyone, including O.E.E.C., from erecting office buildings on the land now owned by O.E.E.C. They subsequently obtained a judgment against O.E.E.C. to that effect, and the *Procureur Général* now appealed, on the ground that the Court of first instance had acted *ultra vires* in exercising jurisdiction over O.E.E.C. and real property owned by O.E.E.C. He contended that the Minister of Foreign Affairs had stated that the Protocol to the Convention of 1948 which established O.E.E.C. was designed to confer upon O.E.E.C. complete immunity from the jurisdiction of the French courts, including immunity from jurisdiction in actions affecting real property in France.

Held: that the interpretation of the Convention and the Protocol by the Minister of Foreign Affairs was concerned with a matter of public policy and was therefore binding upon the French courts, and that the judgment of the Court of first instance must accordingly be set aside.

The Court said: " O.E.E.C. have stated that they appeared in the Court of first instance only as a matter of courtesy and solely for the purpose of raising an objection to the jurisdiction on the ground of the immunity conferred on the Organization by Articles 2 and 3 of Protocol No. 1 to the Convention for European Economic Co-operation of April 16, 1948. The Court of first instance overruled this objection and gave judgment for the plaintiffs. Contrary to the finding of the Court of first instance, the law of July 10, 1948, authorized the President of the Republic to ratify the said Convention, and the latter, in accordance with Article 26 of the Constitution, has been the subject-matter of publication by Decree dated August 27, 1948, and appears in the *Official Gazette* (*Journal Official*) of August 29, 1948. The Convention which has thus been properly promulgated in France has accordingly the force of law. By a telegram dated April 10, 1952, addressed to the Minister of Justice, the Minister of Foreign Affairs stated that ' Articles 2 and 3 of the Protocol to the Convention of April 16, 1948, have the definite object of conferring complete immunity from jurisdiction on O.E.E.C. and, as a necessary consequence thereof, of eliminating the distinction sometimes made between actions concerning immovable and actions concerning movable property '. Therefore, ' it follows from the principles so enunciated that actions arising from the application of these Articles are removed from the jurisdiction of the courts and are settled by agreement between the French Government and the Secretary-General of O.E.E.C.' Where the interpretation of a treaty, as in the present case, which is concerned with the extent of immunity from jurisdiction, raises a question of public policy, the courts must comply with the official interpretation, which can only be supplied by the French Government. Accordingly in assuming jurisdiction over an action brought against O.E.E.C which, far from having waived its immunity, expressly relied upon such immunity, the Court of first instance exceeded its powers, and its judgment must be set aside."

[Report: *Dalloz et Sirey*, 1955, *Jurisprudence*, p. 633.]

Treaties—Interpretation of—Agencies of Interpretation—Treaty Affecting Individuals—Contents of Treaty relating to Matter of Public Policy—Whether Judiciary or Executive Competent to Interpret Treaty—The Law of France.

KIRBY BEARD AND CO., LTD. *v.* DIRECTEUR-GÉNÉRAL DES IMPÔTS.

France, Cour de Cassation. July 13, 1954.

THE FACTS.—Article 11 of the Franco-British Treaty of February 28, 1882, provides that the subjects of each of the Contracting Parties, in the territory of the other, shall be exempt from " extraordinary contributions levied as a result of exceptional circumstances ". A French Law of August 15, 1945, provided for the levying of a so-called " national solidarity tax ", and the appellants, an English Company with a business established in France, were called upon to file the requisite return to enable the French revenue authorities to levy the appropriate amount of this tax on the French assets of the appellants. The appellants refused to file the return, contending that the " national solidarity tax " was an " extraordinary contribution ", from the payment of which they were exempt by virtue of Article 11 of the Franco-British Treaty. On behalf of the French revenue authorities, it was contended that after an Exchange of Notes between the French and British Governments it had been agreed between the two Governments that British subjects should be liable to pay this tax, and that thereupon the French Government, as it was entitled to do in a matter concerning public policy (*ordre public*), had provided the courts with an authoritative interpretation of the Franco-British Treaty to the effect that British subjects were liable to the tax.

Held: that the statement of the French Government to the effect that British subjects were liable to the "national solidarity tax" was binding on the courts, and that the appellants, as an English Company, were under a duty to file the requisite return.

The Court said: "The complaint is made that the Court below held, notwithstanding the wording of Article 11 of the Treaty, that the national solidarity tax was not an extraordinary contribution levied as a result of exceptional circumstances so as to make the said Treaty applicable. The lower Court was concerned with a question of fiscal immunity, *viz.*, a question of public policy (*ordre public*), the determination of which depended on the interpretation of the Treaty here referred to. In view of this the lower Court was bound to adopt the official interpretation of the French Government according to which Article 11, which grants to the respective subjects of the two countries exemption from 'extraordinary contributions levied as a result of exceptional circumstances', does not apply so as to benefit British subjects in the matter of the national solidarity tax. This follows from a Note sent on September 19, 1946, by the French Minister for Foreign Affairs to the British Ambassador in Paris, and a reply thereto by the latter, dated October 18, 1946, which stated that the British Government did not intend to dispute the view expressed by the French Government. As the appellant Company, which was not entitled to any exemption according to the general wording of the Law of August 15, 1945, relied solely on Article 11 of the Treaty, the Court below was entitled to consider the interpretation thereof by the Government to be necessary for a determination of the present dispute, because it was far from certain that the national solidarity tax was in the nature of an extraordinary contribution levied as a result of exceptional circumstances, within the meaning of the Franco-British Treaty of February 28, 1882. . . . The appeal is dismissed."

[Report: *Sirey*, 1955, *Jurisprudence*, Part I, p. 24.]

NOTE.—See also *Société Schweppes* v. *Administration de l'Enregistrement*, a judgment of the Cour de Cassation of February 2, 1954: *Revue critique de droit international privé*, 43 (1954), p. 771, and *Dalloz*, 1954, *Sommaires*, p. 52.

Treaties—Interpretation of—Agencies of Interpretation—Treaty providing for National Treatment of Aliens—Whether Control of Aliens a Matter of Public Policy—Interpretation of Treaty by Judiciary or Executive—The Law of France.

MINISTÈRE PUBLIC *v.* CARILLO-FRONTELLO.

France, Court of Appeal of Paris. March 2, 1954.

THE FACTS.—A French Law of November 12, 1938, provides that aliens who trade in France without being in possession of a trading permit shall be guilty of an offence. The appellant, a Spanish national, was convicted of an offence under this law. On appeal, it was contended on his behalf that by virtue of the Franco-Spanish Treaty of January 7, 1862, which provided for the national treatment of Spanish subjects in matters of this kind, he was exempt from the requirement of holding a permit, and that the conviction should therefore be quashed. On behalf of the prosecution (cross-appellants herein) it was contended that, although the Franco-Spanish Treaty of 1862 provided for national treatment and by virtue of the French Constitution took precedence over French municipal law, it was for the Minister of Foreign Affairs to interpret the Treaty. The Minister having stated that all aliens trading in France, without exception, were required to hold trading permits, the Court had to follow this interpretation by the Executive which, moreover, was an interpretation adopted in accordance with French public policy (for the control of aliens) and in strict application of the principle of reciprocity, seeing that French nationals trading in Spain were liable to a similar requirement in that country.

Held: that, having regard to the interpretation adopted by the Minister of Foreign Affairs—which was binding on the Court—and the need to observe the principle of reciprocity, the appellant's conviction must stand.

The Court said: " The Criminal Chamber of the Cour de Cassation in two judgments of March 24, 1953,[1] ordered the Judge of first instance—which the Court below failed to do—to defer judgment in all cases in which a treaty requires interpretation and in which the Government has not made known its views; and where it has made known its views, to comply with the official interpretation. The Court pointed out, in a case which is identical with the one now before us, that it is for the Judge of first instance to consult the Minister of Foreign Affairs as to whether the Franco-Spanish Treaty of January 7, 1862, has the effect of giving Spanish nationals in France the right to trade without being in possession of the special permit which every foreign trader must hold, and as to whether French nationals resident in Spain are entitled, by virtue of reciprocity, to carry on a business in that country without authorization. The judgment in the case here referred to holds that the interpretation of an international agreement falls within the exclusive field of competence of the Ministry for Foreign Affairs. Treaties belong, almost by definition, to the field of activity of the diplomatic service, and derive, in principle, from the right of sovereignty. It is therefore for the Government to exercise the right of interpretation, and the Government which concludes treaties is alone entitled to apply and interpret them. An interpretation so applied is binding on the courts.

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[1] *Cf. Procureur Général of the Court of Appeal of Pau* v. *Ara-Arroyos* (*International Law Reports*, 1953, p. 437) and *Re Bruni and Galtier* (*ibid.*, p. 438).

" The French Constitution of October 27, 1946, is not contrary to international jurisprudence and custom. According to Article 31 thereof, the President of the Republic is entitled to be kept informed of negotiations in the international field, and to sign and ratify treaties. The Prime Minister is entitled only to ' ensure the execution of all laws ' (Article 47). Furthermore, Article 28 of the Constitution provides that treaties duly ratified and published have greater authority than municipal laws. It follows that as treaties are of a higher content than municipal law, it is ultimately for the Minister of Foreign Affairs to define their scope. The reply of the Minister of Foreign Affairs of June 18, 1953, states that although Spanish nationals can claim, by virtue of the Franco-Spanish Treaty of 1862, national treatment in France in the matter of commercial activities, they cannot thereby escape the measures of control which the State of their residence considers it necessary to take against aliens for reasons of public policy. The reply of the Minister also points out that, in so far as concerns equal treatment, this principle is generally acknowledged in Spain, where such control is exercised. In these circumstances the issue of a trader's permit is, from the point of view of public policy, only a measure for controlling the activities of aliens in France, and it follows that to require such a permit in the case of Spanish nationals is no more than an application of the principle of reciprocity which is in accordance with the Treaty, seeing that such control, established in France by the Law of 1938, has existed in Spain, in so far as concerns our nationals, since 1935, and that the Franco-Spanish Treaty has not been abrogated or amended in this respect. We are therefore entitled to hold that the Treaty is not such as to give Spanish nationals the right to trade in France without obtaining the special permit required of all aliens.

" The Law of November 12, 1938, is only one of the forms of application of the Law of June 17, 1938, concerning the protection of French trade and industry. The object of this Law—as in Spain—is the protection of French workmen and French industry, which justifies this country in requiring a permit similar to that required in Spain. Article 1 of the Law lays down the principle of equality of treatment of aliens, *viz.*, treatment equal to that applicable to French nationals resident in the countries of origin of the aliens concerned. This Law provides, furthermore, that to the extent that its provisions are incompatible with international agreements, amendments will be made so as to adapt existing agreements to the provisions of the Law. No such adaptation has taken place, and it is abundantly clear that the Law of November 12, 1938, cannot be regarded as being in derogation of the Treaty of January 7, 1862, and must be applied with all its legal consequences to Spanish nationals resident in France who are not entitled to engage in trade without possessing a special identity card bearing the inscription ' trader ' ".

[Report: *Sirey*, 1955, *Jurisprudence*, Part II, p. 24.]

Note.—In *Ministère Public* v. *Vallès*, the same Court (differently constituted), in a judgment of April 1, 1954, arrived at the opposite conclusion. The Court took the view that the Treaty clearly provided for national treatment, and that the question of reciprocity was immaterial. It further held that the Treaty must take precedence of municipal law, and that as the Minister of Foreign Affairs, instead of expressly replying to the question whether Spanish nationals were required to hold a special identity card, had merely stated that they were not exempt from measures of control taken in the interests of public policy, it was for the Court to apply the Treaty in preference to the Law of November 12, 1938, and the Court was therefore bound to quash the conviction: *Sirey*, 1955, *Jurisprudence*, Part II, p. 26, and *Dalloz*, 1954, *Jurisprudence*, p. 280. See also *Ministère Public* v. *Hurtado* and *Ministère Public* v. *Sastella*, both judgments of the same Court, dated April 1, 1954, and quashing convictions under the Law of November 12, 1938; the first in the case of a Spanish national, in application of the Franco-Spanish Treaty of 1862, and the second in the case of a Swiss national, in application of the Franco-Swiss Treaty of February 23, 1882, similarly providing for national treatment: *Clunet*, 81 (1954), p. 776. See also *Ministère Public* v. *Jimenez*, a judgment of the Court of Appeal of Toulouse, dated May 21, 1954 : *Dalloz*, 1954, *Jurisprudence*, p. 446.

Treaties—Interpretation of—Agencies of Interpretation—Treaty Conferring Privileges on Certain Aliens—Whether Judiciary or Executive Competent to Interpret Treaty—The Law of France.

MINISTÈRE PUBLIC *v.* G. AND ANOTHER.

France, Tribunal Correctionnel of the Seine. December 4, 1954.

The Facts.—The first defendant was a Roumanian citizen domiciled in France, and the second defendant was a French citizen. A French Decree of November 12, 1938, provided that all foreign nationals engaging in trade in France were required first to obtain a trader's identity card. The first defendant was charged with an offence under the Decree here referred to. The second defendant who had lent his name to the trading firm with which the first defendant was associated and which he, the first defendant, in fact conducted entirely on his own, was charged with aiding and abetting the offence. On behalf of the first defendant, it was contended that by virtue of the Franco-Roumanian Treaty of August 27, 1930, and the Geneva Convention of July 28, 1951, relating to the Status of Refugees, he was entitled to engage in trade without first obtaining a trader's identity card. On behalf of the prosecution, it was contended that whatever privileges these Treaties might confer on certain foreign nationals, their interpretation was a matter for the Ministry of Foreign Affairs, and as the latter had previously stated that there was no treaty which exempted foreign nationals from the requirement of obtaining a trader's identity card, the Court was bound by that statement, and the defendants were therefore guilty of the offences with which they were respectively charged.

Held: that the Court was bound by the statement of the Ministry of Foreign Affairs, and that the defendants were guilty of the offences charged.

The Court said: " G. (the first defendant) contended that his Roumanian nationality gave him the right to trade in France, without being in possession of a foreign trader's card, by virtue of the Franco-Roumanian Treaty of August 27, 1930, and having regard to the Geneva Convention of July 28, 1951, relating to the Status of Refugees. The courts are competent to interpret treaties only where such treaties are concerned with the private interests of nationals of the signatory Powers. On the other hand, the Government alone is competent to interpret questions of public law (*droit public*), and an interpretation so given binds the Judge. The answer to the question whether a treaty confers on the nationals of a foreign Power the right to exemption from certain restrictions imposed by municipal law under threat of punishment, requires an interpretation of the treaty which is concerned with public law and as such is reserved to the Government. By a letter dated December 23, 1953, and addressed to the Public Prosecutor, the Minister of Foreign Affairs, who had been asked whether the Franco-Roumanian Treaty gave Roumanian nationals the right to trade in France without obtaining the foreign trader's card provided for in the Decree of November 12, 1938, replied as follows: ' I have the honour to inform you that no international agreement exempts from the requirement of a trader's card a foreign national who wishes to engage in France in any industrial, commercial or artisan's activity.' This interpretation, which, having regard to the generality of the terms used, applies equally to the Convention relating to the Status of Refugees, is binding on the Court. It follows that G. cannot successfully contend that the restrictions imposed on aliens, so far as concerns the exercise of a trade, by the Decrees of November 12, 1938, and February 2, 1939, and the Law of October 8, 1940, cannot be relied upon as against him. G. and M. are therefore guilty of the offences charged. . . . "

[Report: *Revue critique de droit international privé*, 43 (1954), p. 778.]

Treaties—Interpretation of—Agencies of Interpretation—Statement of Executive.

See p. 432 (*Brownell* v. *City and County of San Francisco*).

Treaties—Interpretation of—Agencies of Interpretation—Statement of Executive.

See p. 82 (*United States* v. *Ushi Shiroma*).

Treaties—Interpretation of—Agencies of Interpretation.

See p. 136 (*Mackay Radio and Telegraph Company* v. *Lal-la Fatma Bent Si Mohamed el Khadar and Others*).

II.—Principles and Rules of Interpretation

Treaties—Interpretation of—Principles of—Interpretation by Reference to Object of Treaty—Interpretation of Conventions Providing for Unification of Rules of Private Law—Warsaw Convention of October 12, 1929, on International Carriage by Air —Limitation of Liability for Loss of Cargo.

American Smelting and Refining Co. *et al.* v. Philippine Airlines, Inc., of Manila.

United States, Supreme Court of New York, New York County. June 21, 1954.

Supreme Court of New York, Appellate Division, First Department. May 3, 1955.

Court of Appeals of New York. June 8, 1956.

The Facts.—The plaintiff Company delivered to the defendant air carrier at Oakland, California, a consigment of gold for shipment to Hongkong. The gold shipment arrived in Manila after refuelling and servicing stops had been made by the plane at Honolulu, Kwajalien, and Guam. The gold was transferred to another of the defendant's aircraft at Manila. This plane crashed in attempting to land at Kai-Tak Airport, Hongkong, and the consignment of gold bars was never recovered. The plaintiff Company contended that the failure of the air waybill to state and list the stops of the plane at Honolulu, Kwajalien, Guam, and Manila was a violation of Article 8 of the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw on October 12, 1929 (*L.N.T.S.*, 137 (1933), p. 11), and that the defendant Corporation was thereby deprived of the protection of any of the provisions of that Treaty which exclude or limit liability. The defendants denied that the omission of such information from the air waybill precluded them from obtaining the benefit afforded by other provisions of the Warsaw Convention and asserted that, in any event, their liability was limited to approximately $16.50 per kilogram of cargo lost as a result of the crash.

Five other related cases were involved, and it was stipulated by the respective parties that the decision in the present action would be deemed the decision in each of the other five cases, except for the amount of damages, if any, which the Court might award.

Held (by the Supreme Court of New York, New York County): that judgment must be rendered for the defendant air carrier. The

Warsaw Convention must be reasonably and liberally construed in such a manner as to carry out its obvious purposes. The purpose of the requirement of inserting the agreed stopping places in the air waybill was to put the shipper on notice of the international character of the flight and of the applicability of the Warsaw Convention, where the places of departure and destination did not themselves indicate such facts. In the present case, the international character of the flight was apparent from the face of the air waybill, which listed Oakland, California, as the place of departure and Hongkong as the destination. The defendant corporation was without liability since it took all necessary measures to avoid the damage.

The Court said: "The 'Convention for the Unification of Certain Rules Relating to International Transportation by Air,' concluded at Warsaw, Poland, on October 12, 1929, commonly known as the 'Warsaw Convention,' 1934 U. S. Av. R. 239, occupies the status of a treaty among nearly all governments of the world. Final adherence to this international treaty on the part of the United States was proclaimed by the President on October 29, 1934 (49 U. S. Stat., 3000).

"These rules for international air transportation thus became part of the law of the land, superseding state law (United States Constitution Article VI; *United States* vs. *Belmont*, 301 U. S. 324;[1] *Moscow Fire Ins Co.* vs. *Bank of New York*, 280 N. Y. 286;[2] *Wyman* vs. *Pan-American Airways*, 181 Misc. 963, 1943 U. S. Av. R. 1).

"Article 8 of the Warsaw Convention provides as follows:

'The air waybill shall contain the following particulars: (a) the place and date of its execution; (b) the place of departure and of destination; (c) the agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the transportation of its international character; (d) the name and address of the consignor; (e) the name and address of the first carrier; (f) the name and address of the consignee, if the case so requires; (g) the nature of the goods; (h) the number of packages, the method of packing and the particular marks or numbers upon them; (i) the weight, the quantity, the volume or dimensions of the goods; * * * (q) a statement that the transportation is subject to the rules relating to liability established by this Convention.'

"Article 9 thereof provides that if the carrier accepts goods without a proper air waybill as set forth in the foregoing article 8 (a) to (i), inclusive, and article 8 (q), the carrier 'shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability.'

"Concededly, the air waybill here involved does not specifically set forth the 'agreed stopping places' referred to in article 8,

[[1] See *Annual Digest*, 1935–1937, Case No. 15.]
[[2] *Ibid.*, 1938–1940, Case No. 53.]

subdivision (c). It is plaintiff's contention, as above noted, that exact compliance with article 8 is mandatory and defendant's failure to adhere thereto in every respect prevents the air carrier from availing itself of any of the other provisions which limit or exclude liability for safe carriage. Contrary to plaintiff's contention, however, it is a general principle of construction with respect to treaties that they be reasonably and liberally construed so as to carry out their obvious purposes (*Geofroy* vs. *Riggs*, 133 U. S. 258, 271; *Ross* vs. *Pan-Am. Airways*, 1949 U. S. Av. R. 168, 299 N. Y. 88, 98; *Matter of Zalewski*, 292 N. Y. 332, 336[1]). Thus, the merit of plaintiff's contention is dependent upon the meaning and purpose of article 8, subdivision (c).

" The authorities seem to be in unanimous agreement that the purpose of article 8, subdivision (c), is to put the passenger or consignee [consignor ?] on notice of the international character of the flight and the applicability of the Warsaw Convention *where the places of departure and destination do not themselves indicate such facts*. As stated by Dr. K. M. Beaumont, foremost British authority on the Warsaw Convention, ' The object of inserting at least one agreed stopping place is important when carriage between two territories of the same state is involved because, unless there is an agreed stopping place in another State, the carriage would not be " international." If the agreed carriage is between two Contracting States, there is no need to insert an agreed stopping place in order to establish that the carriage is "international." . . . ' (16 Journal of Air Law and Commerce, 1949, p. 395, 398). Dr. D. Goedhuis, another well-known authority on the Warsaw Convention, states that ' the agreed stopping places were also considered a necessary item so as to determine whether or not the carriage was international within the meaning of the Warsaw Convention ' (Goedhuis, Nat. Air Legislation and the Warsaw Convention, p. 148; see also *Grein* vs. *Imperial Airways, Ltd.* (1937), 1 K. B. 50, 80–81, 1936 U. S. Av. R. 211;[2] *Kraus* vs. *K. L. M.*, 1949 U. S. Av. R. 306, 92 N. Y. Supp. (2d) 315, 317, aff'd 278 App. Div. 811). Thus, it was the apparent intention of the parties to the treaty that ' the agreed stopping places ' be inserted in the air waybill only to exclude the possibility of the application of the law of any jurisdiction which might be adverse to the provisions of the Warsaw Convention, as they related to and regulated international flights (*Grein* vs. *Imperial Airways, Ltd., supra*).

" In the instant action, the purpose behind article 8, subdivision (c) was not thwarted or otherwise affected by the omission of the information complained of herein. The international character of the flight is readily observed on the face of the air waybill. The place of departure therein is stated as Oakland, California, and the

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[[1] See *Annual Digest*, 1941–1942, Case No. 118.]

[[2] *Ibid.*, 1935–1937, Case No. 214.]

place of destination as Hongkong. The consignee was put on notice not only of the international character of the flight but also of the applicability of the provisions of the Warsaw Convention.

" Contrary to plaintiff's argument for strict and literal conformity to the language of article 8, Dr. Beaumont also notes (*supra*, pp. 399–400):

' Article 8 provides that the consignment note shall contain seventeen specified particulars, only ten of which, however, are obligatory under Article 9, as mentioned above. Some of these, namely those relating to the cargo, can obviously be supplied only by the consignor, the others, relating to the carriage itself can only be supplied by the carrier. Yet . . . the obligation to complete the whole of the consignment note is . . . upon the consignor . . . though the carrier is subjected to unlimited liability without defense if any of ten obligatory particulars is omitted. This makes the strict legal position quite absurd.'

" It cannot be doubted that no causal connection existed between the omission and the accident. Plaintiff's loss would have been the same whether or not the stopping places appeared on the face of the air waybill. Moreover, plaintiff must be deemed to have been aware of the fact that refueling and servicing stops between Oakland, California, and 8,500 miles, were necessarily to be made by defendant. It is significant that plaintiff, fully cognizant of the applicability of the Warsaw Convention and those provisions limiting or excluding liability in the event of loss, could readily have eliminated any risk by paying a supplemental fee for the flight and then designating on the air waybill its request for insurance up to one hundred per cent. of the declared value of the cargo (Warsaw Convention, article 22, subdiv. 2). Plaintiff did not request this protection and thereby must be deemed to have assumed the complete risk of the flight and the full effect of the exclusion of liability provision of the Warsaw Convention. It is to be noted the plaintiff *specifically* advised defendant that it did not desire any insurance of the cargo. Yet, if plaintiff's position were sustained by the court, a judgment in its favor would, in effect, hold defendant liable as an insurer of the full value of the shipment, even though defendant was paid only the usual cargo rate. Moreover, if plaintiff's position was upheld, not only would defendant be deprived of the right of excluding or limiting its liability, but also of any right to defend against claims arising from the agreement between the parties. Such a result would be grossly unjust, harsh, and inequitable and contrary to the purpose and aims of the Warsaw Convention. In view of the fact, therefore, that the air waybill in the instant action clearly shows on its face the international character of the flight, the non-inclusion of the places for refueling and servicing of the plane is of no consequence and does not constitute a failure to comply with article 8, subdivision (c) of the Warsaw Convention which would warrant the denial of defendant's right to the protection of the exclusion from and/or limitation of liability provisions of article 20 thereof.

" Article 20 excludes a carrier from all liability if it establishes that it took ' all necessary measures to avoid the damage or that it was impossible . . . to take such measures.' The article further provides that ' In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage ' (49 U. S. Stat., 3019).

" The proof adduced upon the trial conclusively establishes that defendant took all possible precautions to insure the safety of the flight and to avoid the crash of its aircraft. The record shows that defendant properly equipped, loaded and fueled the plane, supplied an airworthy and duly licensed aircraft, a licensed and qualified pilot and crew who were given all necessary maps, charts and instructions, and that defendant adopted sound flight procedures in accordance with all applicable rules and regulations. The credible evidence proves that the crash of defendant's plane was caused by a combination of factors, including negligent piloting, faulty and erroneous instructions from the Kai-Tak Airport control tower, possible failure of the pilot to obey instructions from the control tower and/or to follow defendant's established landing procedures, poor weather conditions, and a dangerous landing field and surrounding terrain. These factors entitle defendant to exclusion from all liability pursuant to the foregoing provisions of article 20 of the Warsaw Convention.

" Nevertheless, inasmuch as proof was taken on all of the issues raised by the pleadings, I deem it appropriate to make findings as to the amount of damages for which defendant would be liable in order to obviate the necessity of a new trial in the event that an appellate court does not agree with the conclusion that has been here reached with respect to the cause of the plane crash and the applicability of article 20 (*supra*).

" In such event, defendant's liability would be limited by article 22, subdivision 2, of the Warsaw Convention, which provides as follows:

' (2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to the sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.'

" As above noted, plaintiff specifically chose not to afford itself of the added protection made available to it by this article. Plaintiff's recovery, therefore, cannot exceed the above stated 250 francs ($16.50) per kilogram of cargo loss . . . "

(The Court then computed the damages which would be payable to the plaintiffs in the other five actions, if liability should be found to exist.) [Reports: 1954 U.S. and Canadian Aviation Reports, 221; *New York Law Journal*, June 21, 1954, p. 6; 4 Aviation Cases 17, 413.]

The plaintiffs appealed successively to the Appellate Division (First Department) of the Supreme Court of New York and the Court of Appeals of New York.

Held (by both Courts, without opinion): that the decision of the Court of first instance must be affirmed.

[Reports: 285 App. Div. 1119, 141 N.Y.S. 2d 818; 1 N.Y. 2d 866, 136 N.E. 2d 14.]

Treaties—Interpretation of—Principles of—Interpretation by Reference to Report of Legislative Committee—Interpretation by Reference to " Traditional Policy " of Signatory State—Consideration of Preparatory Work.

HOWARD CLAIM.

United States, International Claims Commission.[1]

THE FACTS.—Virginia Howard, a United States national, claimed $9,365 in respect of a debt owed to her by " Higiea ", a Yugoslav corporation which had been nationalized by the Government of Yugoslavia and in which she was a stockholder. She also claimed in respect of the nationalization itself.

Article 4 (c) of the Agreement of July 19, 1948, between the Governments of the United States of America and Yugoslavia regarding pecuniary claims of the United States and its nationals, provides:

" The Government of Yugoslavia recognizes the obligation of the successor enterprises created by it with respect to debts valid under Yugoslav law which were incurred prior to the nationalization or other taking, for the benefit of the enterprises nationalized or otherwise taken, provided, however, that there shall be deemed fully settled and discharged all debt obligations of enterprises, nationalized or otherwise taken, owing to nationals of the United States whose claims against the Government of Yugoslavia with respect to the nationalization or other taking of such enterprises are claims which are fully settled and discharged by this agreement; . . ."

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[1] The exact date of the decision does not appear from the Report as published in 1955. It would seem that the decisions of the Commission were given in the years 1951–1954.

For the establishment and functions of the Commission see *supra*, p. 55, n. 1.

Held: that the claim in respect of the debt must fail, as the debt had not been " taken " by Yugoslavia; but that the claim in respect of the nationalization must be allowed.

The Commission said: " If this claim were based solely on a debt owed by ' Higiea ', it would not appear that it would be compensable from the fund created by Article 1 of the Agreement of July 19, 1948, with Yugoslavia for the reason that the debt remains valid and subsisting and has not been ' taken ' by Yugoslavia. [The Commission here cited the first few lines of Article 4 (c) of the Agreement, reproduced above, and continued:] the debt in question would appear to fulfil the conditions set out in that Article and, accordingly, since Yugoslavia recognizes the debt, no claim would arise for its ' taking '.

" However, the claimant has based her claim not only on the taking of a debt owed by ' Higiea ' but on the nationalization or taking of ' Higiea ' by the Government of Yugoslavia. [The Commission cited the proviso to Article 4 (c) quoted above.] Since we shall allow the claim for the taking of ' Higiea ' by the Government of Yugoslavia, that claim was fully settled and discharged by the Agreement. That being so, the debt obligation is also settled and discharged and no claim with respect thereto may be allowed.

" This proviso was explained by the Senate Committee on Foreign Relations in its report on the bill which became the International Claims Settlement Act of 1949 as follows:

' In Article 4 (c) the Yugoslav Government recognized the obligation of successor enterprises for the valid debts of predecessor enterprises nationalized or otherwise taken. An exception is contained as to a limited category of such debts. Where a person participates in the $17,000,000 distribution as the owner of an enterprise, he releases the Yugoslav Government from a debt obligation to the same person with respect to the same enterprise. The negotiators understood such cases of creditor-owner to be few in number and subject to the criticism that owners having control of an enterprise might have been in a position to enter questionable debts on its records. It was agreed that should an owner exercise the option of claiming dollar compensation for his ownership interest, he would release the Yugoslav Government of the debt obligation, such obligations being in all then known instances dinar obligations.'[1] (S. Rept. 810, p. 11, 81st Cong., 1st sess.)

" It may also be remarked in this connection that the Senate Report contains the following statement with respect to debt claims generally:

' . . . the claims settled do not include creditor interests. They are confined to ownership interests in property, either legal or beneficial, direct or indirect. This is consistent with traditional United States policy in connection with espousals.' (*Idem.*)"

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[1] This report reflects the views of the State Department officials who negotiated the Agreement with Yugoslavia and testified before the Senate Committee with respect to the claims embraced by the Agreement.

[Report: *Settlement of Claims*, 1949–1955, p. 66.]

Treaties—Interpretation of—Principles of—Interpretation by Reference to Legislative History of Relevant Enactment.

CISATLANTIC CLAIM.

United States, International Claims Commission.[1]

THE FACTS.—Cisatlantic Corporation, incorporated under the laws of the State of New York, claimed the sum of $1,102,840 in respect of the nationalization by the Government of Yugoslavia of two Yugoslav corporations, shares in which were alleged to have been owned by the claimant Corporation.

Article 1 of the Agreement of July 19, 1948, between the Governments of the United States of America and Yugoslavia regarding pecuniary claims of the United States and its nationals provided for the settlement and discharge of claims of "nationals of the United States . . . on account of the nationalization and other taking by Yugoslavia of property and of rights and interests in and with respect to property which occurred between September 1, 1939, and the date hereof". Article 2 of the Agreement provided that such claims included those which at the time of nationalization or other taking were:

> "(B) Directly owned by a juridical person organized under the laws of the United States, or a constituent state or other political entity thereof, twenty percent or more of any class of the outstanding securities of which were at such time owned by individual nationals of the United States, directly or indirectly through interests in one or more juridical persons of whatever nationality, or otherwise; . . ."

Virtually all the shares of the Cisatlantic Corporation were held by Edgar Ausnit, president of the Corporation. In March 1946, he transferred 40 shares to a trust established for the benefit of his son, Peter Charles Ausnit. Edgar Ausnit and Peter Charles Ausnit were naturalized in the United States on December 20, 1948, and April 7, 1947, respectively. .

In 1939, Max Ausnit (brother of Edgar Ausnit), a national of Roumania and there residing, purported to transfer certain securities (for brevity called "CEPI stock") to his son, Steven Ausnit, who was then living in London and who subsequently, in 1944, became a naturalized citizen of the United States. In 1940, Max and Edgar Ausnit agreed to exchange 2,000 shares of the stock held on behalf of Steven and 2,000 shares of CEPI stock owned by Cisatlantic Corporation for, *inter alia*, shares of " Sartid " and " Brod ", two Yugoslav corporations, which were to be sold and the proceeds divided equally between Steven Ausnit and the Cisatlantic Corporation. The exchange was effected but the re-sale was not. In 1946, the Sartid and Brod corporations were nationalized by the Yugoslav Government. The facts, which are complicated, appear more fully in the *Held* below.

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[1] The exact date of the decision does not appear from the Report as published in 1955. It would seem that the decisions of the Commission were given in the years 1951–1954.

For the establishment and functions of the Commission see *supra*, p. 55, n. 1.

The claimant contended, *inter alia*, that Steven Ausnit and Cisatlantic Corporation having engaged in a common enterprise, namely, an " investment contract ", to realize 4,000 shares of which Steven Ausnit owned more than 20 per cent. and acquire Sartid and Brod shares with the proceeds, the claimant had a right to compensation on the nationalization of Sartid and Brod.

Held (in a preliminary decision): that the claim must fail. The fact that Steven Ausnit held more than 20 per cent. of the CEPI stock was not sufficient to entitle Cisatlantic Corporation to make a claim. What was contemplated by the Agreement of 1948 was the holding by a United States national of at least 20 per cent. of the outstanding securities of the corporation making the claim, and an " investment contract " was not an outstanding security.

The Commission said: " The Yugoslav property for which compensation is sought was taken before April 7, 1947, that is before either Edgar or Peter Ausnit became United States citizens . . . [The Commission then quoted the relevant provisions of the Agreement and continued:] Since claimant was organized under the laws of the State of New York it is eligible as to place of organization. Assuming that the transfer to a trust for the benefit of Peter Ausnit was effective, a question we need not decide, prior to April 7, 1947, the date of his naturalization, claimant was not eligible because none of its ' outstanding securities ', as we understand those words, were owned by citizens of the United States.

" Claimant, however, asserts that the meaning of the phrase ' any class of the outstanding securities ' of a corporation ' is as broad as the phrase " financial interest " or investment in a corporation.' From this premise, it argues that the term ' any class of the outstanding securities ' embraces *assets* of the claimant in the form of shares of stock of other corporate entities and the proceeds of the sale of any such shares of stock. It is noted in this connection that claimant's quotation from the act [*sic.*] fails to include the significant phrase ' of which ', which in our view is a clear reference to the issuance of securities by a corporate claimant."

In 1939, Max Ausnit, who resided in Roumania, the country of his birth, owned 5,960 shares of CEPI stock. Because of the unrest in Europe, and in anticipation of confiscatory measures, Max Ausnit wrote to his son Steven, residing in London: " A very serious situation may arise, which will make further correspondence with you impossible. I herewith transfer into your property 5,960 CEPI-shares, which are deposited [in] London." Max and Edgar Ausnit then agreed to obtain cash or other securities in exchange for 2,000 of the shares of CEPI stock held on behalf of Steven and 2,000 shares of CEPI stock held by Cisatlantic. It was their intention that the proceeds of these 4,000 shares should be divided equally between the Cisatlantic Corporation and Steven Ausnit. With regard to this arrangement, the Commission said: " We are not convinced that a transfer of ownership was effected between Max Ausnit and his son. This alleged transfer may have been no more than a convenient vehicle for removing, temporarily, an asset of Max Ausnit from possible confiscation. However, it is unnecessary to decide this question.

" In pursuance of the arrangement between Cisatlantic and Steven Ausnit, the 4,000 shares of CEPI stock were exchanged for 34,535 shares of Sartid stock (out of a total issuance of 50,000 shares) and for 226,810 shares of Brod stock . . . In the light of these circumstances, claimant's position is that the shares of Sartid and Brod stock constitute ' any class of the outstanding securities ' of *Cisatlantic*; that more than 20 percent of the 4,000 shares were held by Steven Ausnit; that Steven Ausnit became a naturalized citizen of the United States on October 27, 1944; and that at the time of nationalization or other taking, Steven Ausnit was an individual national of the United States. . . .

" We believe the facts and argument as presented by claimant provide an obvious answer to the problem posed. . . . The transaction must be viewed as the facts suggest—an arrangement limited to intended profits resulting from the conversion of shares of CEPI stock for other assets, presumably money, as the end result of the effort. . . . it is clear that claimant did not acquire as its own Steven Ausnit's 2,000 shares of CEPI stock.

" In any event, even if the total 4,000 shares of CEPI stock are treated as belonging to the claimant corporation, that circumstance would not aid it in establishing eligibility. The Agreement does not refer to outstanding securities ' owned by ' a claimant. If that had been intended we believe that the Agreement would have so provided. It was clearly not the intention of the Agreement to predicate eligibility based upon the assets owned by a corporate claimant. It was the ownership characteristics of the corporation which was of interest. Just as individuals must be nationals of the United States to qualify as claimants, ownership interests *in a corporation* by individual United States nationals of at least 20 percent was made an absolute requirement. The fact that the term ' security ' may embrace an ' investment contract ' has no relevance in determining individual ownership of a corporation. It is basic that an owner, i.e., a stockholder, has no defined right in individual assets of a corporation. The question of interest here simply is whether an individual

United States national acquired sufficient securities *issued by a corporation* of domestic organization so that his nationality may be attached to the corporate entity. Such an inquiry must be satisfied *before* examination is made of the corporation's assets. The CEPI shares were issued by a foreign corporation and represent assets of the claimant, just as a piece of machinery or an office desk similarly would represent property owned by a corporation. These have no significance, however, in determining whether this Government would be justified in espousing the claims of an American corporation against a foreign government. This was made clear by the legislative history incident to the Agreement and the International Claims Settlement Act of 1949:

'It is well known that many American corporations have *stockholders* who are foreign nationals.

'Under international law, governments have been known to espouse claims of their corporations, although all of the corporate stock be foreign held. This Government, in the negotiations with the Yugoslav Government, did not take this extreme position, being of the view that a substantial American interest should exist *in an American juridical entity* prior to espousal of the entity's claim. It was agreed that this *substantial interest* would be twenty percent or more of any class of outstanding securities which were at such time (the time of the nationalization or other taking of property) owned by individual nationals of the United States.' (Emphasis supplied.) (S. Rept. 800, 81st Cong., 1st sess., pp. 10–11.)

"The following statements were made during the debate in the House on H.R. 4406, 81st Congress, 1st sess.:

'Mr. Rubicoff. . . . It [the Agreement] sets up the procedure as to how these claims will be paid. It is provided that if 20 percent of the corporation is owned by citizens of the United States, then the entire corporation receives its recompense.' (Congressional Record July 5, 1949, p. 9016 (unbound).)

'Mr. Beckwith. . . . I repeat, the chief beneficiaries under this legislation are American corporations, foreign corporations, where American citizens own 20 percent of their stock . . . ' (Congressional Record July 6, 1949, p. 9153 (unbound).)

'Mr. Lodge. . . . This injustice is more the evident, when it is noted that under the Yugoslav Agreement, Article 2, section B, it was provided that the national of any country, even an enemy, could recover from the $17,000,000 fund if he owned stock in an American corporation, 20 percent of whose stock was owned by United States nationals.' (Congressional Record March 7, 1950, p. 3011 (unbound).)

'Mr. Richards. . . . this settlement goes to American citizens or nationals, or American corporations with 20 percent ownership by Americans . . .' (Congressional Record March 7, 1950, p. 3014 (unbound).)

"Although we have given somewhat extended treatment to the question raised by claimant, we have no difficulty reaching the conclusion that the shares of CEPI stock did not constitute 'any class of the outstanding securities' of Cisatlantic within the meaning of Article 2 of the Agreement, and that the 20 percent requirement was not at any time satisfied.

"Claimant also asserted eligibility on another ground [namely, the transfer on March 21, 1946, of 40 shares of Cisatlantic in trust for Peter Ausnit]. As previously indicated, Peter Ausnit became a national of the United States on April 7, 1947." The Commission examined the evidence of the nationalization of Sartid and Brod and came to the conclusion that "under the provisions of Law No. 677 of December 5, 1946, the date of nationalization or other taking with reference to the claim herein is December 5, 1946."

The claimant Corporation and Steven Ausnit now moved for leave to amend the claim by adding Steven Ausnit as a claimant for the amount of $551,420 with interest. Steven Ausnit contended that he was the beneficial owner of one-half of the shares in Sartid legally owned by Cisatlantic Corporation. The Yugoslav Government informed the Commission that Cisatlantic Corporation had sold the 226,810 shares in Brod to a bank in Croatia and had lent the proceeds to Sartid.

Held: (1) that the application to add Steven Ausnit as a claimant must be granted and an award made to him based upon a one-half interest in the Sartid shares. In determining the value of those shares, the debt owing by Sartid to the Cisatlantic Corporation must be taken into consideration; and (2) that the preliminary decision rejecting the claim of Cisatlantic must be confirmed.

[Report: *Settlement of Claims*, 1949–1955, p. 69.]

Treaties—Interpretation of—Principles of—Convention Incorporated in Municipal Statute—Whether then to be Interpreted in Light of English Law—Whether Original Text of Convention may be Consulted—Hague Rules on Carriage of Goods by Sea—Carriage of Goods by Sea Act, 1924.

PYRENE CO. LD. *v.* SCINDIA NAVIGATION CO. LD.

England, Queen's Bench Division. April 14, 1954.
(Devlin J.)

THE FACTS.—This was an action in tort for negligence and the main issue was whether the damage was limited by the Carriage of Goods by Sea Act, 1924, which incorporated the "Hague Rules" of 1922; in particular, the Court had to decide whether the text of the 1922 Convention (the authoritative version of which was in French) might be employed to interpret the English statute.

The plaintiffs delivered a fire tender, sold under contract of sale f.o.b. London, alongside a ship nominated by the buyers. While the tender was being hoisted on to the vessel with the ship's tackle, and before it crossed the rail, it was dropped and damaged. The plaintiffs sued the defendant shipowners for £966, the cost of repairing the tender. The shipowners admitted liability but contended that the amount of damage was limited by Article 4 (5) of the Hague Rules as incorporated in the Schedule to the Act of 1924, which Article provides: " Neither the carrier nor the ship shall . . . be . . . liable for any loss or damage to or in connexion with the goods in an amount exceeding," in effect, £200.

The plaintiffs contended that Article 4 (5) did not apply because:—(1) as the accident occurred before the tender crossed the ship's rail, it was never loaded on to the ship and thus was outside the period specified in Article 1 (e) of the Rules, which provides " Carriage of ' goods ' covers the period from the time when the goods are loaded on to the time when they are discharged from the ship "; nor were the goods " loaded " in the sense of Article 2, which provides " . . . under every contract of carriage of goods by sea the carrier, in relation to the loading, . . . and discharge of such goods, shall be . . . entitled to the rights and immunities hereinafter set forth "; (2) Article 1 (b) of the Rules provides that they apply " only to contracts of carriage covered by a bill of lading . . . in so far as such document relates to the carriage of goods by sea." But in this case, said the plaintiffs, though a bill of lading was drawn up, it was not issued, so that the Rules were not applicable to this contract; (3) In any case, they argued, the Rules had no application as between themselves and the shipowners because the former were not a party to the contract of affreightment.

Held: that the Hague Rules did apply, and that the damage was therefore limited.

(1) The Rules did not attach to a period of time but to a contract or part of a contract. The words " carriage of goods by sea " must include loading. The words " loaded on " in Article 1 (e) did no more than define the first of a series of operations which together constituted the carriage to which the Rules applied. " Loading " as used in Article 2 was not confined to the stage after the goods had crossed the ship's rail but included the whole operation of loading. This interpretation could be confirmed by examination of the French text of the Convention.

(2) Whenever a contract of carriage was concluded and it was contemplated that a bill of lading would be issued in due course, the contract was from its inception " covered " by a bill of lading and was thus a contract within the Rules.

(3) On a true construction of the contract the sellers were parties to it.

The judgment of Devlin J. is principally concerned with a detailed examination of the relevant Hague Rules, and also with doctrines of English law about the privity of contract. The following two passages, however, deal with points of interpretation which are relevant to general international law.

Concerning the significance of the phrase "loaded on" in Article 1 (e) of the 1924 Act, His Lordship said: "There is another reason for thinking that it would be wrong to stress the phrase 'loaded on' in Article 1 (e). It is no doubt necessary for an English court to apply the rules as part of English law, but that is a different thing from assuming them to be drafted in the light of English law. If one is inquiring whether 'loaded *on*' in Article 1 (e) has a different meaning from 'loaded' or 'loading' in other parts of the rules, it would be mistaken to look for the significant distinction in the light of a conception which may be peculiar to English law. The idea of the operation being divided at the ship's rail is certainly not a universal one. It does not, for example, apply in Scotland: *Glengarnock Iron and Steel Co. Ld.* v. *Cooper & Co.*, (1895) 22 R.672, *per* Lord Trayner. It is more reasonable to read the rules as contemplating loading and discharging as single operations. It is no doubt possible to read Article 1 (e) literally as definining the period as being from the completion of loading till the completion of discharging. But the literal interpretation would be absurd. Why exclude loading from the period and include discharging? How give effect to the frequent references to loading in other rules? How reconcile it with Article 7 which allows freedom of contract 'prior to the loading on and subsequent to the discharge from'? Manifestly both operations must be included. That brings me back to the view that Article 1 (e) is naming the first and last of a series of operations which include in between loading and discharging, 'handling, stowage, carriage, custody and care.' This is, in fact, the list of operations to which Article 2 is by its own terms applied. In short, nothing is to be gained by looking to the terms of Article 1 (e) for an interpretation of Article 2."

On the further point that Article 2 of the Rules excludes all but the carrier and the holder of the bill of lading, His Lordship said: "Article 2 grants rights to and imposes responsibilities upon the carrier 'under any contract of carriage.' Prima facie those rights and responsibilities must be against or towards every other party to the contract. But, so it is contended, 'contract of carriage' by its definition excludes all parties except the carrier and the holder of the bill of lading. This contention derives from the concluding words of Article 1 (b) 'from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.' In my judgment, those words do not apply to bills of lading generally but only to bills of lading issued under a charterparty; and even then they are intended to define not the parties to the contract but the moment at which the bill of lading becomes a contractual document within the meaning of the rules. I base this conclusion upon the sense of the paragraph as a whole as well as upon its punctuation. If there is any doubt the French text (set out in Carver, 9th ed., p. 1065) makes it quite clear. Having regard to the preamble to the Act and the fact that the French text is the only authoritative version of the Convention, I think, notwithstanding Mr. Megaw's objection, that it is permissible to look at it. I agree that it is not conclusive, but it may help to solve an ambiguity if there be one. I agree also that unless the court is assisted by a French lawyer it should be looked at cautiously; but the appreciation of this particular point needs no more French than every schoolboy knows, and I think it would be pedantic to ignore it."

[Report: [1954] 2 Q.B. 403.]

Treaties—Interpretation of—Principles of—Interpretation in the Light of Changed Circumstances—Necessity for Express Limitation of Freedom of Territorial State—Rhine Navigation Convention.

GEERVLIET *v.* BELGIAN CORPORATION SCHEEPSWERF DE DURME.

Holland, District Court of Rotterdam. April 9, 1954.

THE FACTS.—This was a claim for damages on account of a collision which took place on December 13, 1950, on the river Waal near Hurwenen, in the jurisdiction of the District Court of Arnheim, which is a Rhine Navigation Court. The plaintiff sued before the District Court of Rotterdam, which is also a Rhine Navigation Court. The defendant challenged the competence of that Court, but at a later stage of the proceedings dropped this plea. This did not relieve the Court from examining *ex officio*, having regard to considerations set out below in the *Held*, whether it was competent in the present case, having regard to the provisions of the Mannheim Convention in the matter of jurisdiction.

Held: that the Court was competent. The Court said: "The collision took place on a river which, according to Article 1, para. 3, of the Revised Convention of Mannheim of 1868 concerning Navigation on the Rhine (hereinafter called the Rhine Convention), is regarded as being part of the Rhine. This is an action under Article 34 of the Rhine Convention. Article 33 of this Convention cannot be understood otherwise than as meaning that actions under Article 34 belong to the exclusive jurisdiction of the Rhine Navigation Courts. The present action can, therefore, only be adjudicated by a Rhine Navigation Court, in the sense of the Rhine Convention. If the present action were presented to a court which was not a Rhine Navigation Court, the court would have to decline competence since Article 33 of the Rhine Convention regulates the competence *ratione materiae*. This Court is a Rhine Navigation Court. Article 35 of the Convention, so far as it bears on this case, provides: 'La compétence appartiendra . . . en matière civile au tribunal dans le ressort duquel . . . le dommage aura été causé.' If this provision were to be applied *ex officio* by a Rhine Navigation Court, the Court at Arnheim, which also is a Rhine Navigation Court, would have exclusive competence in the present case since the damage occurred within the jurisdiction of that Court."

The Court then examined whether Article 35 of the Rhine Convention governing collisions which have occurred both inside and outside the Netherlands should be applied *ex officio*. As to collisions which occur on the Rhine outside the Netherlands, it confirmed its views in the *Tanutra case* (see supra, p. 276).

The Court further stated that in the present case it did not need to decide the question whether parties may confer jurisdiction on a Netherlands Rhine Navigation Court to adjudicate in a case which belongs to the competence of a Rhine Navigation Court in one of the other riparian States. It had merely to decide the question whether the parties may entrust the adjudication of a case to a Netherlands Rhine Navigation Court other than that designated by Article 35 of the Rhine Convention. In this respect, no obligation of the Netherlands under international law was involved. The Rhine Convention imposed on the signatory States an obligation to establish Rhine Navigation Courts that should be able to fulfil the task laid down by the Convention. It did not, however, limit the freedom of those States to indicate—and determine—the number of such courts. A regulation by which the Netherlands State, for instance, would designate as Rhine Navigation Courts the Rotterdam courts for the rivers Lek and Rhine and the courts at Dordrecht for the river Waal, would be compatible with the obligation which Article 33 of the Rhine Convention imposed on the Netherlands. If the draftsmen of Article 35 had intended not to allow the parties to refer a dispute to a national Rhine Navigation Court other than the one of the same State which would normally be competent, such intention would not have found clear expression in the word " appartiendra ". Every doubt in this connection would have been removed if in Article 35 the phrase " appartiendra exclusivement " or similar words had been employed. Article 35 must not, however, be considered in isolation. It must be read in conjunction with the provisions of the Rhine Convention and against the background of the period when it was drafted. The Rhine Convention was signed in 1868 by four German and two non-German States. When travelling on the Rhine in 1868, more frontiers had to be crossed than nowadays. In those days only a part of the Rhine fleet was propelled by steam power, and motor barges had not yet come into use. The average duration of voyages on the Rhine was considerably longer than it is at present. The provisions of paras. 1 and 3 of Article 36 of the Rhine Convention presuppose that a Rhine navigation case will begin immediately after damage has been incurred, and that it will be brought to a close as soon as possible by proceedings which, in principle, interrupt the voyage. This conception no longer answers present day exigencies. In 1868, in the municipal procedural law of all riparian States, regulations of competence *ratione loci* could be set aside by agreement of the parties. Such were and are the contents of Articles 154 and 156 of the Netherlands Code of Civil Procedure and of Articles 168, 169 and 170 of the French " Code de Procédure civile ", whereas in the German riparian States French procedural law was in force at that time. It must be assumed that, if those who drafted the Convention had intended to depart from that general principle in connection with the Rhine Navigation Courts within each of the riparian States, such an intention would have been clearly expressed by the insertion of the word " exclusivement " in Article 35 of the Convention after the word " appartiendra ". Since this was not done, it must be assumed that the Signatory Powers did not intend to depart from the said general principle of procedural law as to the competence *ratione loci* of the Rhine Navigation Courts within their territories.

Moreover, from the *travaux préparatoires* of the Rhine Convention it was clear that the draftsmen of Article 35 envisaged only collisions caused by bargemen who were not nationals of the State where the collision took place, and that the distribution of the competence *ratione loci* of the Rhine Navigation Courts among the riparian States was considered as an obligatory regulation, in no circumstances to be set aside, but that the possibility of optional conferment of jurisdiction in a Rhine navigation case on a Rhine Navigation Court of the same riparian State other than the Court of the resort where the damage was caused, was never discussed. This led to the conclusion that Article 35 of the Rhine Convention was intended as a regulation of the competence *ratione loci* of the Rhine Navigation Courts in the international sphere, and that this provision contained in the municipal sphere a regulation of the competence *ratione loci* equivalent to the municipal regulations of competence *ratione loci*. In Rhine navigation cases where it was proposed to confer competence on courts of a riparian State other than the State where the damage was caused, Article 35 of the Rhine Convention had to be applied *ex officio*, whereas this was not so in cases where competence was exclusively conferred on courts of the same riparian State.

[Report: *Tijdschrift*, Vol. I, p. 430.]

NOTE.—Judge Erades of the Rotterdam District Court appended the following observations to the report in *Tijdschrift*, *loc. cit.*: " For many years it has been the constant practice of the District Court of Rotterdam to give judgment in Rhine navigation cases in which other Netherlands Rhine Navigation Courts would be competent if the parties expressly or implicitly request the Court so to do." This practice seems to be inspired by reasons of expediency. It has been criticized by Dr. H. Fortuin in *Nederlands Juristenblad*, 1952, p. 282, as being contrary to a long series of judgments of the Central Commission for Rhine Navigation at Strasbourg, which requires that Article 35 of the Rhine Convention be applied *ex officio*, but as far as can be ascertained from the work of the Central Commission's Secretary-General (M. Henri Walther, *La jurisprudence de la Commission Centrale pour la Navigation du Rhin* (1948)), all the Central Commission's judgments deal with cases in which competence was conferred on a Rhine Navigation Court in another riparian State than the State where the damage was caused. The case reported above seems to provide a considered explanation of the practice of the Rotterdam Court.

Treaties—Interpretation of—Principles of—Restrictive Interpretation—Stateless Persons—Treatment of—Security for Costs—Refugee Resident Abroad.

SECURITY FOR COSTS (STATELESSNESS) CASE.

Switzerland, Commercial Court of Zürich. April 1, 1954.

THE FACTS.—This was an action by a stateless person, holder of a Nansen passport and resident in France since 1933 as a " résident privilégié ". The question before the Court was whether the plaintiff was liable to give security for costs. It was contended on his behalf that he was not so liable, on the ground that, as a " résident privilégié ", he was exempt in France from the payment of security for costs required of aliens, and that he must accordingly be regarded as a " ressortissant " of France for the purpose of Article 17 of the Hague Convention on Civil Procedure exempting such " ressortissants " from giving security for costs in Switzerland, particularly as a judgment awarding costs against him could be enforced in France.

Held: that the plaintiff was liable to give security for costs. Only nationals of the Contracting Parties were exempt from giving security for costs by virtue of Article 17 of the Hague Convention on Civil Procedure.

The Court said: " It has always been held—and there is no reason to depart from this position—that international treaties must be interpreted restrictively, and that an interpretation going beyond the terms of a treaty can be admitted only if it must be concluded from the context or the preparatory work of a provision that the intention of the parties was different from the terms of the treaty and was, by an oversight, incorrectly expressed.

" The interpretation of the Hague Convention put forward by the plaintiff, and based on its ' spirit ', clearly goes beyond its terms, since under it not only nationals of the contracting States would be exempted from giving security for costs, but also stateless persons who are assimilated to its nationals by the legislation of a contracting State for the purpose of civil procedure on its territory. There are no grounds for the view that this corresponds to the intention of the Parties, and that the narrower drafting of Article 17 is incorrect. Accordingly, the plaintiff's contention cannot be accepted. It should be added that stateless persons in France are also not exempt from giving security for costs if they are resident abroad . . .

" The fact that a judgment awarding costs against the plaintiff can be enforced in France does not affect the situation. Moreover, as appears from the reply of the Federal Department of Justice and Police, dated March 19, 1954, to an inquiry by this Court of September 23, 1953, there are not at present any other provisions binding on Switzerland from which the exemption of the plaintiff from giving security for costs can be deduced. The Arrangement concerning the Legal Status of Russian and Armenian Refugees of June 30, 1928, merely contains recommendations. The Convention concerning the Legal Status of Refugees, of October 28, 1933, has not been ratified by Switzerland. The legal position will change only when the Agreement concerning the Legal Status of Refugees signed on June 28, 1951, enters into force in Switzerland; in conformity with Article 16, para. 3, of that Agreement a refugee resident in France will be assimilated to French nationals resident in France for the purposes of exemption from giving security for costs in proceedings before the Swiss courts."

[Reports: *Blätter für Zürcherische Rechtsprechung*, 1954, No. 39; *Annuaire suisse de Droit international*, vol. XII (1955), p. 178.]

Treaties—Interpretation of—Principles of—Interpretation by Reference to Municipal Enactment Bringing Treaty into Force—Interpretation by Reference to Governmental Practice—Interpretation by reference to Reported Decisions of Other Claims Commissions.

See p. 156 (*Bogovic Claim*).

III.—Bilingual Treaties

Treaties—Interpretation of—Bilingual Treaties.

See p. 297 (*Pyrene Co. Ld.* v. *Scindia Navigation Co. Ld.*).

IV.—Consideration of Preparatory Work

Treaties—Interpretation of—Consideration of Preparatory Work.

See p. 291 (*Howard Claim*).

Treaties—Interpretation of—Use of Preparatory Work.

See p. 258 (*Parke Davis & Co.* v. *Comptroller of Patents, Designs and Trade Marks and Another*).

E—SPECIAL KINDS OF TREATIES

I.—Commercial Treaties. Most-Favoured-Nation Clause

Treaties—Special Kinds of—Commercial Treaties—Most-Favoured-Nation Clause—Operation of—Requirement of Reciprocity in Relation to Treaty with Most-Favoured Nation.

FISCAL EXEMPTION (GREECE) CASE.

Greece, Conseil d'État. 1954.

(Merticopoulos, President.)

THE FACTS.—The Convention concerning Establishment and Judicial Protection concluded between Greece and Switzerland on December 1, 1927 (brought into force by Law 3610 of 1928) provides in Article 9 that " in no case shall the nationals of either of the Contracting Parties be subjected on the territory of the other Contracting Party to charges, customs duties, taxes, dues or contributions of any nature different from or higher than those which are or will be imposed on subjects of the most-favoured nation ". Article 11, which relates to commercial, industrial, agricultural and financial companies, duly constituted according to the laws of one of the Contracting Parties and having their siège on its territory, provides that the said companies " shall enjoy, in every respect, the benefits accorded by the most-favoured-nation clause to similar companies, and, in particular, they shall not be subjected to any fiscal contribution or charge, of whatever kind and however called, different from or higher than those which are or will be levied on companies of the most-favoured nation ".

The appellants in the present case, a Swiss Company whose head office was situated in Geneva, claimed exemption from income tax, invoking in support of that claim the Anglo-Greek Convention of 1936 for the Reciprocal Exemption from Income Tax on Certain Profits or Gains Arising from an Agency (ratified by Law 426 of 1937). Under that Convention, the profits or gains arising in Greece to a person resident, or to a body corporate whose business is managed and controlled, in the United Kingdom, were exempted from Income Tax unless they arose from the sale of goods from a stock in Greece or accrued through a branch or management in Greece or through an agency in Greece where the agent had a general authority to negotiate and conclude contracts.

The appellants contended that they had no establishments of that kind in Greece, seeing that their representative there did not have the power to enter into contracts in his own name and for his own account; in consequence, the conditions required by the Anglo-Greek Convention being fulfilled, the appellants ought to be exempted from income tax.

Held: that the appeal must succeed. The appellants were entitled to fiscal exemption, irrespective of reciprocity.

The Court said: " The Court below, in interpreting the Convention between Greece and Switzerland, accepted the fact that the fiscal exemption of Swiss enterprises in Greece depends on the existence of a corresponding exemption in Switzerland (either directly or, by virtue of the most-favoured-nation clause, indirectly, by the exemption of the enterprises of some third State), for Greek enterprises carrying on business there through a representative, in exactly the same way as the exemption of British enterprises in Greece depends on the exemption in Great Britain of Greek enterprises carrying on business there. Bearing in mind that, as had been proved, no such exemption is in force in Switzerland, the Court below rejected entirely that particular ground of appeal and held, in consequence, that the appellants' assertion as to the limited powers of their representative in Greece was not relevant and need not be considered further.

" The object of the most-favoured-nation clause, particularly in economic treaties, is to avoid the risk of the position of nationals of the contracting States eventually becoming disadvantageous in comparison with that of the nationals of other States in the sphere of international commercial competitions. Thanks to the working of that clause, each of the two Contracting States on the one hand accords to the other any advantages which it has already accorded to a third State, and on the other hand assumes the obligation of according to the other State any advantage which it will accord to a third State in the future so long as the treaty remains in force. The accrual of the latter privilege to a party benefiting under the clause takes place—so far as the treaty does not provide to the contrary—*ipso jure*, without there being any obligation to provide anything in return, even if the concessions made in favour of a third State are not unilateral but are made conditional on reciprocity. Interpreted in that way, the clause ensures the realization of the object for which it was inserted into the Treaty, namely, the assimilation in each of the two States, as regards those matters with which the clause is concerned, of the nationals or companies of the other State to the nationals or companies of a favoured third State.

" In this case, the most-favoured-nation clause in the Greco-Swiss Convention is free from restrictions or onerous conditions, and thus gives Swiss businesses carried on in Greece the right to fiscal exemption on the same conditions as those on which that exemption is accorded to British firms, even if Greek firms do not enjoy in Switzerland the same privileges as they enjoy in Great Britain. The order appealed from, which made the appellants' exemption depend on the existence in Switzerland of a corresponding similar system in favour of Greek firms established there, interpreted the

Greco-Swiss Convention incorrectly and must therefore be quashed, in accordance with the second ground of the present appeal. The case must be remitted to the same Court for enquiry into the question whether the appellants fulfilled the conditions requisite for benefiting under the Greco-Swiss Convention and also into the correctness of the further ground of appeal that the appellants' branch in Greece was not of the kind which, under the provisions of the said Convention, was excluded from fiscal exemption."

[Report: *Revue Hellénique de Droit International*, 8 (1955), p. 301.]

Treaties—Most-Favoured-Nation Treatment—National Treatment—Absence of Discrimination—International Law and Municipal Law.

REX *v.* HANS BECKMANN.

Norway, Supreme Court. May 6, 1954.

THE FACTS.—The accused had accepted employment as a whaler on board a Dutch whaling ship, the *William Barensz*, which took part in the Dutch whaling expedition during the season 1952/53. He was prosecuted for having violated the Whaling Law of June 16, 1939, as amended by a Statute of May 24, 1946, forbidding Norwegian citizens, Norwegian companies and persons domiciled in Norway to participate in any way in whaling expeditions under a foreign flag. The accused admitted that he had acted as charged by the prosecuting attorney, but submitted in defence that the Law in question was contrary to the spirit and the principles of the Norwegian Constitution since it imposed special burdens on a small class of persons, namely, the whalers. The Court, for reasons which are not relevant here, overruled this argument. The accused also contended that the Law was in contravention of international law and, in particular, of treaties concluded with the Netherlands. Paragraph 5 (*a*) of the Whaling Law provided as follows:

> "It is forbidden for Norwegian companies, citizens or domiciled persons directly or indirectly to participate in or co-operate in furthering whaling with floating factories under an alien flag.
>
> "The King or whom he authorizes thereto may except from this provision foreigners or foreign companies which engaged in whaling in the last antarctic whaling season before September 3, 1939, or a foreign whaling factory which before that date was being used for whaling."

The relevant treaty provisions are set forth in the *Held* below. The accused was convicted, and sentenced to a fine of 10,000 kroner (£500) and to confiscation of his illegal profit to the value of 50,000 kroner (£2,500).

On appeal,

Held (*per* Berger J., for an unanimous Supreme Court): that the appeal must be dismissed.

The Court said: " The defence has claimed that the Statute, even though according to its actual wording it applies to a case like the present one, must not be given a literal interpretation and that it must be construed so as not to embrace the acts of the accused since a literal interpretation would be contrary to the international obligations of our country, in particular in regard to the Netherlands. I am unable to hold that the legal situation under Article 5 (*a*) of the Whaling Law of June 16, 1939, with the supplementary Law of May 24, 1946, contravenes treaties entered into by Norway or principles which Norway has undertaken in international commitments to respect. This is so as regards treaties entered into both before and after the enactment of the Statutes of 1939 and 1946. In particular, the Treaty of Commerce and Navigation entered into with the Netherlands on May 20, 1912, is not incompatible with Norway's right to introduce a regulation such as that contained in Article 5 (*a*) of the Whaling Law. Neither Article 1 of the Treaty which secures reciprocal most-favoured-nation treatment to the respective citizens,[1] nor Article 3 which guarantees 'national treatment '[2] in the other country, purports to cover such situations as are regulated by Article 5 of the Whaling Law. The defence has particularly stressed that the dispensation in the second paragraph of Article 5 (*a*) is a discrimination against the Netherlands in violation of the most-favoured-nation clause in the Treaty of 1912. This argument is without foundation. The provision in question is general in character and puts all countries which did not engage in whaling before September 3, 1939, on the same footing. I hold, therefore, that there is no basis for such a restrictive interpretation of Article 5 (*a*) of the Statute as has here been suggested.

" I need not, accordingly, discuss the consequences of a possible inconsistency between a municipal statute and an obligation of international law."

[Report: *Rt.*, 1954, p. 478.]

II.—Peace Treaties

Treaties—Special Kinds of—Peace Treaties—Position of Ryukyu Islands under the Treaty of Peace with Japan.

See p. 82 (*United States v. Ushi Shiroma*).

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[1] In the French text this provision runs as follows: " Le traitement sur le pied de la nation la plus favorisée sera garanti . . ."

[2] The French text is as follows: " Le traitement réservé au pavillon national pour tout ce qui regarde les navires ou leur cargaison sera réciproquement garanti . . ."

PART IX

INTERNATIONAL ORGANIZATION AND ADMINISTRATION

A—INTERNATIONAL ORGANIZATION IN GENERAL

International Organization—In General—Constitutions of International Organizations—Action *ultra vires (détournement de pouvoir)* the Organization.

FRENCH REPUBLIC *v.* HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY

European Coal and Steel Community, Court of Justice.

December 21, 1954.

This was an appeal by the French Government against certain decisions of the High Authority of the European Coal and Steel Community in application of the Treaty of April 18, 1951, establishing the Community. The Judgment of the Court is concerned with the application of particular Articles of the Treaty and, inasmuch as it does not raise general questions of international law, it does not call for a report in the present volume. Brief reference may, however, be made to that part of the Judgment which is concerned with the allegation that some of the contested decisions of the High Authority constituted a *détournement de pouvoir* (action *ultra vires*). In particular, it was contended that while Article 60 of the Treaty conferred certain powers upon the Authority with the view to preventing discriminatory practices, the decisions in question, taken under the above Article, were governed by the intention to bring about a lowering of the general price level and to prevent price agreements. Article 33 of the Treaty confers upon the Court jurisdiction, *inter alia,* in appeals alleging an abuse of powers on the part of the Authority.

The Court rejected the appeal. The relevant passage of the Judgment is as follows: " Even if the Decisions in question have been partially inspired by the intention to introduce a new system better suited than the previous one to be observed by the enterprises, one cannot conclude from this that the purpose of the Decision was to legitimate the infractions previously committed. At any rate, it is evident that the Decisions were especially destined to pursue the objectives referred to in the Treaty. Even if among the motives which do justify the action of the High Authority, there had been an unjustified one, namely, the preoccupation to avoid sanctioning the guilty enterprises, the Decisions would not, because of that, be vitiated by *détournement de pouvoir,* inasmuch as they do not infringe upon the essential objective, which is the prohibition of unfair competitive practices and of discrimination."

[Report: *Official Gazette of the European Coal and Steel Community*, 4 (1955), p. 22.]

B—THE UNITED NATIONS

II.—The General Assembly

United Nations—Organs of—General Assembly—Implied Powers of General Assembly—Limits of Implied Powers—Officials of United Nations—Administrative Tribunal of the United Nations—Awards of—Whether Binding upon the General Assembly.

EFFECT OF AWARDS OF COMPENSATION MADE BY THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL.

International Court of Justice.

(Sir Arnold McNair, President; Guerrero, Alvarez, Hackworth, Winiarski, Klaestad, Badawi, Read, Hsu Mo, Levi Carneiro, Armand-Ugon, Kojevnikov, Judges.)

Advisory Opinion of July 13, 1954.

THE FACTS.—In 1953 the Administrative Tribunal of the United Nations gave a number of awards in the matter of complaints of certain members of the Secretariat of the United Nations who had been discharged by the Secretary-General of the United Nations and who alleged that their discharge was illegal. In some of these cases the Tribunal found that the complaint was justified and made awards in favour of the officials concerned. The question having arisen before the General Assembly whether it was bound to comply with the awards, the General Assembly decided, in December 1953, to submit the following legal questions to the International Court of Justice for an Advisory Opinion:

" (1) Having regard to the Statute of the United Nations Administrative Tribunal and to any other relevant instruments and to the relevant records, has the General Assembly the right on any grounds to refuse to give effect to an award of compensation made by that Tribunal in favour of a staff member of the United Nations whose contract of service has been terminated without his assent?

" (2) If the answer given by the Court to question (1) is in the affirmative, what are the principal grounds upon which the General Assembly could lawfully exercise such a right?"

The relevant provisions of the Statute of the Administrative Tribunal are set out in the *Held* below.

Held (by nine votes to three, the latter being the votes of Judges Alvarez, Hackworth and Levi Carneiro): that the General Assembly has not the right on any grounds to refuse to give effect to an award of compensation made by the Administrative Tribunal of the United Nations in favour of a staff member of the United Nations whose contract of service has been terminated without his assent.

The Court said:

[I. Res Judicata *and the Finality of Awards of the Administrative Tribunal.*] " This [the first] Question is strictly limited in scope. It relates solely to an award made by the Administrative Tribunal of the United Nations in favour of a staff member of the United Nations whose contract of service has been terminated without his assent. According to Article 2, paragraph 1, of the Statute of that Tribunal, it ' shall be competent to hear and pass judgment upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members '. A comparison between this provision and the terms of the first Question submitted to the Court shows that an award as defined by that Question must be considered as falling within the competence of the Tribunal as defined by Article 2. A claim arising out of the termination of a contract of service without the assent of the staff member must, in fact, either fall within the term ' non-observance of contracts of employment ', or relate to ' the terms of appointment ' of the staff member. The Question concerns, in other words, only awards which are made within the limits of the competence of the Tribunal as determined by Article 2. The Court does not therefore seem to be requested to express its view with regard to awards which may exceed the scope of that statutory competence.

" In the Resolution by which the present Advisory Opinion is requested, the General Assembly refers to the request for a supplementary appropriation made in a report of the Secretary-General for the purpose of covering the awards made by the Administrative Tribunal in eleven cases. It also refers to the concurrence in that appropriation by the Advisory Committee on Administrative and Budgetary Questions in its report to the General Assembly, and the first Question refers to the Statute of that Tribunal and ' to any other relevant instruments and to the relevant records '. In none of these reports or relevant records is to be found any suggestion indicating that the Tribunal, when rendering its awards in those eleven cases, was not legally constituted according to the provisions of Article 3 of its Statute. In such circumstances the Court understands that the first Question submitted to it contemplates awards made by a properly constituted Tribunal.

" It is true that by this Question the Court is requested to say whether the General Assembly has the right to refuse to give effect to an award ' on any grounds '. But it is difficult to hold that the General Assembly, by inserting these words, intended to modify the meaning which naturally follows from the other terms of the

Question and from the above-mentioned considerations contained in its Resolution. The Court will, however, come back to this matter later in another connection.

" The first Question is further limited to awards which grant compensation to a staff member, and it relates solely to awards in favour of a staff member whose contract of service has been terminated without his assent. It does not include awards in other disputes arising out of a contract of service. The Court is requested to say whether the General Assembly has the right to refuse to give effect to an award as defined by the Question. The term ' right ' must signify *legal* right. The Court is asked to say whether the General Assembly is legally entitled to refuse to give effect to such awards. The Court is not called upon to express any view with regard to the particular awards which have given rise to the present Advisory Opinion.

" This examination of the first Question shows that the Court is requested to consider the general and abstract question whether the General Assembly is legally entitled to refuse to give effect to an award of compensation made by the Administrative Tribunal, properly constituted and acting within the limits of its statutory competence. The answer to this question depends on the provisions of the Statute of the Tribunal as adopted by the General Assembly on November 24th, 1949, and on the Staff Regulations and Rules as in force on December 9th, 1953. But the Court will also take into account the amendments which were made to the Statute on the latter date. The Court will first consider whether the Tribunal is established either as a judicial body, or as an advisory organ or a mere subordinate committee of the General Assembly.

"Article 1 of the Statute provides: 'A Tribunal is established by the present Statute to be known as the United Nations Administrative Tribunal.' This Tribunal shall, according to Article 2, paragraph 1, ' be competent to hear and pass judgment upon applications ', whereupon the paragraph determines the limits of the Tribunal's competence as already mentioned above.

"Article 2, paragrpah 3, prescribes:

' In the event of a dispute as to whether the Tribunal has competence, the matter shall be settled by the decision of the Tribunal.'

"Article 10 contains the following provisions:

' 2. The judgments shall be final and without appeal.'

' 3. The judgments shall state the reasons on which they are based.'

" These provisions and the terminology used are evidence of the judicial nature of the Tribunal. Such terms as ' tribunal ', ' judgment ', competence to ' pass judgment upon applications ', are generally used with respect to judicial bodies. The above-mentioned provisions of Articles 2 and 10 are of an essentially judicial character and conform with rules generally laid down in statutes or laws issued for courts of justice, such as, for instance, in the Statute of the International Court of Justice, Article 36, paragraph 6, Article 56, paragraph 1, Article 60, first sentence. They provide a striking contrast to Staff Rule 111.1 of the United Nations, which provides:

'A Joint Appeals Board is established to consider and advise the Secretary-General regarding appeals filed under the terms of Staff Regulation 11.1 by staff members serving at Headquarters.'

"The Statute of the Administrative Tribunal contains no similar provision attributing an advisory character to its functions, nor does it in any way limit the independence of its activity. The independence of its members is ensured by Article 3, paragraph 5, which provides:

'No member of the Tribunal can be dismissed by the General Assembly unless the other members are of the unanimous opinion that he is unsuited for further service.'

"The original Statute, as adopted on November 24th, 1949, contained in Article 9 the following provisions:

'If the Tribunal finds that the application is well founded, it shall order the rescinding of the decision contested or the specific performance of the obligation invoked; but if, in exceptional circumstances, such rescinding or specific performance is, in the opinion of the Secretary-General, impossible or inadvisable, the Tribunal shall within a period of not more than sixty days order the payment to the applicant of compensation for the injury sustained. The applicant shall be entitled to claim compensation in lieu of rescinding of the contested decision or specific performance. . . .'

"These provisions were amended on December 9th, 1953. Article 9 now provides in paragraph 1:

'If the Tribunal finds that the application is well founded, it shall order the rescinding of the decision contested or the specific performance of the obligation invoked. At the same time the Tribunal shall fix the amount of compensation to be paid to the applicant for the injury sustained should the Secretary-General, within thirty days of the notification of the judgment, decide, in the interest of the United Nations, that the applicant shall be compensated without further action being taken in his case; provided that such compensation shall not exceed the equivalent of two years' net base salary of the applicant. The Tribunal may, however, in exceptional cases, when it considers it justified, order the payment of a higher indemnity. A statement of the reasons for the Tribunal's decision shall accompany each such order.'

"These provisions prescribe both in the original and in the amended text that the Tribunal shall, if it finds that the application is well founded, order the rescinding of the decision contested or the specific performance of the obligation invoked. As the power to issue such orders to the chief administrative officer of the Organization could hardly have been conferred on an advisory organ or a subordinate committee, these provisions confirm the judicial character of the Tribunal. The amended text contains certain modifications of the Tribunal's powers and procedure, but these modifications have no bearing upon the judicial nature of its functions.

" This examination of the relevant provisions of the Statute shows that the Tribunal is established, not as an advisory organ or a mere subordinate committee of the General Assembly, but as an independent and truly judicial body pronouncing final judgments without appeal within the limited field of its functions.

"According to a well-established and generally recognized principle of law, a judgment rendered by such a judicial body is *res judicata* and has binding force between the parties to the dispute. It must therefore be examined who are to be regarded as parties bound by an award of compensation made in favour of a staff member of the United Nations whose contract of service has been terminated without his assent.

" Such a contract of service is concluded between the staff member concerned and the Secretary-General in his capacity as the chief administrative officer of the United Nations Organization, acting on behalf of that Organization as its representative. When the Secretary-General concludes such a contract of service with a staff member, he engages the legal responsibility of the Organization, which is the juridical person on whose behalf he acts. If he terminates the contract of service without the assent of the staff member and this action results in a dispute which is referred to the Administrative Tribunal, the parties to this dispute before the Tribunal are the staff member concerned and the United Nations Organization, represented by the Secretary-General, and these parties will become bound by the judgment of the Tribunal. This judgment is, according to Article 10 of the Tribunal's Statute, final and without appeal. The Statute has provided for no kind of review. As this final judgment has binding force on the United Nations Organization as the juridical person responsible for the proper observance of the contract of service, that Organization becomes legally bound to carry out the judgment and to pay the compensation awarded to the staff member. It follows that the General Assembly, as an organ of the United Nations, must likewise be bound by the judgment.

" This view is confirmed by express provisions in the Statute of the Administrative Tribunal. Article 9 in the original Statute of 1949 provided:

> ' In any case involving compensation, the amount awarded shall be fixed by the Tribunal and paid by the United Nations or, as appropriate, by the specialized agency participating under Article 12.'

"A similar provision is contained in Article 9, paragraph 3, of the amended Statute. Both provisions show that the payment of an amount of compensation awarded by the Tribunal is an obligation of the United Nations as a whole or, as the case may be, of the specialized agency concerned.

"Article 12 is based on the same legal considerations. It provides that the competence of the Tribunal may be extended to any specialized agency brought into relationship with the United Nations upon the terms established by a special agreement to be made with each such agency by the Secretary-General of the United Nations, and it continues:

> ' Each such special agreement shall provide that the agency concerned shall be bound by the judgments of the Tribunal and be responsible for the payment of any compensation awarded by the Tribunal in respect of a staff member of that agency. . . .'

"As mentioned above, the Statute of the Administrative Tribunal has not provided for any kind of review of judgments, which according to Article 10, paragraph 2, shall be final and without appeal. This rule is similar to the corresponding rule in the Statute of the Administrative Tribunal of the League of Nations, Article VI, paragraph 1, which equally prescribed that ' judgments shall be final and without appeal '. The report of the Supervisory Commission, proposing the Statute of this Tribunal of the League of Nations, shows that the omission of any provision for a review of judgments was deliberate. The report stated:

> ' No provision for the revision of judgments of the Tribunal is inserted in the statute. It is considered that, in the interests of finality and of the avoidance of vexatious proceedings, the Tribunal's judgments should be final and without appeal as is provided in Article VI, paragraph 1.'

" It is likewise the result of a deliberate decision that no provision for review of the judgments of the United Nations Administrative Tribunal was inserted in the Statute of that Tribunal. According to the official records of the General Assembly, Fifth Committee meeting on November 15th, 1946, the representative of Belgium asked the rapporteur of that Committee

> ' whether the decisions of the administrative tribunal would be final or whether they would be subject to a revision by the General Assembly.'

The rapporteur replied

> ' that according to the draft Statute as prepared by the Advisory Committee, there could be no appeal from the administrative tribunal. The Advisory Committee feared an adverse effect on the morale of the staff if appeal beyond the administrative tribunal delayed the final decision in a case which had already been heard before organs within the Secretariat created for that purpose.'

" The General Assembly could, when it adopted the Statute, have provided for means of redress, but it did not do so. Like the Assembly of the League of Nations it refrained from laying down any exception to the rule conferring on the Tribunal the power to pronounce final judgments without appeal.

" This rule contained in Article 10, paragraph 2, cannot however be considered as excluding the Tribunal from itself revising a judgment in special circumstances when new facts of decisive importance have been discovered; and the Tribunal has already exercised this power. Such a strictly limited revision by the Tribunal itself cannot be considered as an ' appeal ' within the meaning of that Article and would conform with rules generally provided in statutes or laws issued for courts of justice, such as for instance in Article 61 of the Statute of the International Court of Justice.

" It may be asked whether the General Assembly would in certain exceptional circumstances be legally entitled to refuse to give effect to awards of compensation made by the Administrative Tribunal. The first Question submitted to the Court asks, in fact, whether the General Assembly has the right to refuse to do so ' on any grounds '. When the Court defined the scope of that Question above, it arrived at the conclusion that the Question refers only to awards of compensation made by the Administrative Tribunal, properly constituted and acting within the limits of its statutory competence, and the previous observations of the Court are based upon that ground. If, however, the General Assembly, by inserting the words ' on any grounds ', intended also to refer to awards made in excess of the Tribunal's competence or to any other defect which might vitiate an award, there would arise a problem which calls for some general observations.

" This problem would not, as has been suggested, raise the question of the nullity of arbitral awards made in the ordinary course of arbitration between States. The present Advisory Opinion deals with a different legal situation. It concerns judgments pronounced by a permanent judicial tribunal established by the General Assembly, functioning under a special statute and within the organized legal system of the United Nations, and dealing exclusively with internal disputes between the members of the staff and the United Nations represented by the Secretary-General. In order that the judgments pronounced by such a judicial tribunal could be subjected to review by any body other than the tribunal itself, it would be necessary, in the opinion of the Court, that the statute of that tribunal or some other legal instrument governing it should contain an express provision to that effect. The General Assembly has the power to amend the Statute of the Administrative Tribunal by virtue of Article 11 of that Statute and to provide for means of redress by another organ. But as no such provisions are inserted in the present Statute, there is no legal ground upon which the General Assembly could proceed to review judgments already pronounced by that Tribunal. Should the General Assembly contemplate, for dealing with future disputes, the making of some provision for the review of the awards of the Tribunal, the Court is of opinion that the General Assembly itself, in view of its composition and functions, could hardly act as a judicial organ—considering the arguments of the parties, appraising the evidence produced by them, establishing the facts and declaring the law applicable to them—all the more so as one party to the disputes is the United Nations Organization itself."

[II. *The Establishment of the Administrative Tribunal and the Implied Powers of the General Assembly.*] " The Court must now examine the principal contentions which have been put forward, in the written and in the oral statements, by the Governments that take the position that there are grounds which would justify the General Assembly in refusing to give effect to awards of the Administrative Tribunal.

" The legal power of the General Assembly to establish a tribunal competent to render judgments binding on the United Nations has been challenged. Accordingly, it is necessary to consider whether the General Assembly has been given this power by the Charter.

" There is no express provision for the establishment of judicial bodies or organs and no indication to the contrary. However, in its Opinion—*Reparation for Injuries suffered in the Service of the United Nations*, Advisory Opinion: I.C.J. Reports 1949, p. 182—the Court said:

> ' Under international law, the Organization must be deemed to have powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.'

" The Court must therefore begin by enquiring whether the provisions of the Charter concerning the relations between the staff members and the Organization imply for the Organization the power to establish a judicial tribunal to adjudicate upon disputes arising out of the contracts of service.

" Under the provisions of Chapter XV of the Charter, the Secretariat, which is one of the principal organs of the United Nations, comprises the Secretary-General and the staff. The Secretary-General is appointed by the General Assembly, upon the recommendation of the Security Council, and he is ' the chief administrative officer of the Organization '. The staff members are ' appointed by the Secretary-General under regulations established by the General Assembly '. In the words of Article 101 (3) of the Charter, ' The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity '.

" The contracts of service between the Organization and the staff members are contained in letters of appointment. Each appointment is made subject to terms and conditions provided in the Staff

Regulations and Staff Rules, together with such amendments as may be made from time to time.

" When the Secretariat was organized, a situation arose in which the relations between the staff members and the Organization were governed by a complex code of law. This code consisted of the Staff Regulations established by the General Assembly, defining the fundamental rights and obligations of the staff, and the Staff Rules, made by the Secretary-General in order to implement the Staff Regulations. It was inevitable that there would be disputes between the Organization and staff members as to their rights and duties. The Charter contains no provision which authorizes any of the principal organs of the United Nations to adjudicate upon these disputes, and Article 105 secures for the United Nations jurisdictional immunities in national courts. It would, in the opinion of the Court, hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them.

" In these circumstances, the Court finds that the power to establish a tribunal, to do justice as between the Organization and the staff members, was essential to ensure the efficient working of the Secretariat, and to give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity. Capacity to do this arises by necessary intendment out of the Charter.

" The existence of this capacity leads to the further enquiry as to the agency by which it may be exercised. Here, there can be no room for doubt.

" In Article 7 of the Charter, after naming the six principal organs, it is provided in paragraph (2):

> ' Such subsidiary organs as may be found necessary may be established in accordance with the present Charter.'

Article 22 provides:

> ' The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions.'

Further, in Article 101, paragraph 1, the General Assembly is given power to regulate staff relations:

> ' The Staff shall be appointed by the Secretary-General under regulations established by the General Assembly.'

"Accordingly, the Court finds that the power to establish a tribunal to do justice between the Organization and the staff members may be exercised by the General Assembly."

[III. *Limits of the Implied Powers of the General Assembly.*] " But that does not dispose of the problem before the Court. Some of the Governments that take the position that there are grounds which would justify the General Assembly in refusing to give effect to awards, agree that the powers of the General Assembly, and particularly its power to establish regulations under Article 101, imply the power to set up an administrative tribunal. They agree that the General Assembly would be able to establish a tribunal competent to hear and decide staff grievances, to prescribe its jurisdiction, and to authorize it to give a final decision, in the sense that no appeal could be taken as of right. They nevertheless contend that the implied power does not enable the General Assembly to establish a tribunal with authority to make decisions binding on the General Assembly itself.

" In the first place, it is contended that there was no need to go so far, and that an implied power can only be exercised to the extent that the particular measure under consideration can be regarded as absolutely essential. There can be no doubt that the General Assembly in the exercise of its power could have set up a tribunal without giving finality to its judgments. In fact, however, it decided, after long deliberation, to invest the Tribunal with power to render judgments which would be ' final and without appeal ', and which would be binding on the United Nations. The precise nature and scope of the measures by which the power of creating a tribunal was to be exercised, was a matter for determination by the General Assembly alone.

" In the second place, it has been argued that, while an implied power of the General Assembly to establish an administrative tribunal may be both necessary and essential, nevertheless, an implied power to impose legal limitations upon the General Assembly's express Charter powers is not legally admissible.

" It has been contended that the General Assembly cannot, by establishing the Administrative Tribunal, divest itself of the power conferred by paragraph (1) of Article 17 of the Charter, which reads:

' The General Assembly shall consider and approve the budget of the Organization.'

This provision confers a power on the General Assembly, for the exercise of which Article 18 requires the vote of a two-thirds majority. Accordingly, the establishment of a tribunal competent to make an award of compensation to which the General Assembly was bound to give effect would, it has been argued, contravene the provisions relating to the budgetary power. The Court is unable to accept this contention.

" The Court notes that Article 17 of the Chapter appears in a section of Chapter IV relating to the General Assembly, which is entitled ' Functions and Powers '. This Article deals with a function of the General Assembly and provides for the consideration and approval by it of the budget of the Organization. Consideration of the budget is thus an act which must be performed and the same is true of its approval, for without such approval there can be no budget.

" But the function of approving the budget does not mean that the General Assembly has an absolute power to approve or disapprove the expenditure proposed to it; for some part of that expenditure arises out of obligations already incurred by the Organization, and to this extent the General Assembly has no alternative but to honour these engagements. The question, therefore, to be decided by the Court is whether these obligations comprise the awards of compensation made by the Administrative Tribunal in favour of staff members. The reply to this question must be in the affirmative. The obligatory character of these awards has been established by the considerations set out above relating to the authority of *res judicata* and the binding effect of the judgments of this Tribunal upon the United Nations Organization.

" The Court therefore considers that the assignment of the budgetary function to the General Assembly cannot be regarded as conferring upon it the right to refuse to give effect to the obligation arising out of an award of the Administrative Tribunal.

" It has also been contended that the implied power of the General Assembly to establish a tribunal cannot be carried so far as to enable the tribunal to intervene in matters falling within the province of the Secretary-General. The Court cannot accept this contention.

" The General Assembly could at all times limit or control the powers of the Secretary-General in staff matters, by virtue of the provisions of Article 101. Acting under powers conferred by the Charter, the General Assembly authorized the intervention of the Tribunal to the extent that such intervention might result from the exercise of jurisdiction conferred upon the Tribunal by its Statute. Accordingly, when the Tribunal decides that particular action by the Secretary-General involves a breach of the contract of service, it is in no sense intervening in a Charter power of the Secretary-General, because the Secretary-General's legal powers in staff matters have already been limited in this respect by the General Assembly.

"A similar problem is involved in the contention that the General Assembly cannot authorize and the Secretary-General cannot enter into contracts of service which are not in conformity with the Charter. The Staff Regulations are made a part of the contracts of service and No. 11.2 reads as follows:

> 'The United Nations Administrative Tribunal shall, under conditions prescribed in its Statute, hear and pass judgment upon applications from staff members alleging non-observance of their terms of appointment, including all pertinent regulations and rules.'

It is contended that the incorporation, in the contracts of service, of the right to rely on the Statute of the Administrative Tribunal would conflict with the powers conferred on the General Assembly and on the Secretary-General by the Charter. In view of the foregoing considerations, the Court cannot accept this contention There can be no doubt that, by virtue of the terms thus incorporated in the contracts of service, and so long as the Statute of the Administrative Tribunal in its present form is in force, the staff members are entitled to resort to the Tribunal and rely on its judgments.

"In the third place, the view has been put forward that the Administrative Tribunal is a subsidiary, subordinate, or secondary organ; and that, accordingly, the Tribunal's judgments cannot bind the General Assembly which established it.

"This view assumes that, in adopting the Statute of the Administrative Tribunal, the General Assembly was establishing an organ which it deemed necessary for the performance of its own functions. But the Court cannot accept this basic assumption. The Charter does not confer judicial functions on the General Assembly and the relations between staff and Organization come within the scope of Chapter XV of the Charter. In the absence of the establishment of an Administrative Tribunal, the function of resolving disputes between staff and Organization could be discharged by the Secretary-General by virtue of the provisions of Articles 97 and 101. Accordingly, in the three years or more preceding the establishment of the Administrative Tribunal, the Secretary-General coped with this problem by means of joint administrative machinery, leading to ultimate decision by himself. By establishing the Administrative Tribunal the General Assembly was not delegating the performance of its own functions: it was exercising a power which it had under the Charter to regulate staff relations. In regard to the Secretariat, the General Assembly is given by the Charter a power to make regulations, but not a power to adjudicate upon, or otherwise deal with, particular instances.

"It has been argued that an authority exercising a power to make regulations is inherently incapable of creating a subordinate body competent to make decisions binding its creator. There can be no doubt that the Administrative Tribunal is subordinate in the sense that the General Assembly can abolish the Tribunal by repealing the Statute, that it can amend the Statute and provide for review of the future decisions of the Tribunal and that it can amend the Staff Regulations and make new ones. There is no lack of power to deal effectively with any problem that may arise. But the contention that the General Assembly is inherently incapable of creating a tribunal competent to make decisions binding on itself cannot be accepted. It cannot be justified by analogy to national laws, for it is common practice in national legislatures to create courts with the capacity to render decisions legally binding on the legislatures which brought them into being.

"The question cannot be determined on the basis of the description of the relationship between the General Assembly and the Tribunal, that is, by considering whether the Tribunal is to be regarded as a subsidiary, a subordinate, or a secondary organ, or on the basis of the fact that it was established by the General Assembly. It depends on the intention of the General Assembly in establishing the Tribunal, and on the nature of the functions conferred upon it by its Statute. An examination of the language of the Statute of the Administrative Tribunal has shown that the General Assembly intended to establish a judicial body; moreover, it had the legal capacity under the Charter to do so.

[IV. *The Practice of the League of Nations as a Precedent.*] "The view has been advanced that the Court should follow what has been called the precedent established by the League of Nations in 1946. On that occasion, the Assembly of the League rejected certain awards of its Administrative Tribunal. It is unnecessary to consider the question whether the Assembly, which in very special circumstances was winding up the League, was justified in rejecting those awards. The cases adjudicated upon by the Tribunal of the League, and the circumstances in which they arose, are different from those which led to the request for this Opinion. Moreover, the cases arose under the Statute of the Administrative Tribunal of the League, and not under the Statute of the Administrative Tribunal of the United Nations, and the Assembly was acting under the Covenant and not under the Charter.

"In view of the complete lack of identity between the two situations, and of the conclusions already drawn by the Court from the Charter and the Statute of the Administrative Tribunal of the United Nations and other relevant instruments and records, the Court cannot regard the action of the Assembly of the League in 1946 as an applicable precedent or as an indication of the intention of the General Assembly when the Statute of the Administrative Tribunal was adopted in 1949."

[Report: *I.C.J. Reports*, 1954, p. 47.]

Judge Winiarski delivered a separate Opinion in the following terms:

"The Advisory Opinion indicates that the question submitted to the Court concerns only awards made by the Administrative Tribunal within the limits of its competence and that it contemplates awards made by the Tribunal when properly constituted. 'It is true', it is said in the Opinion, 'that by this Question the Court is requested to say whether the General Assembly has the right to refuse to give effect to an award "on any grounds". But it is difficult to hold that the General Assembly, by inserting these words, intended to modify the meaning which naturally follows from the other terms of the Question and from the . . . considerations contained in its Resolution.' The Court accordingly formulates as follows the way in which it understands the Question which the Advisory Opinion must answer: 'the Court is requested to consider the general and abstract question whether the General Assembly is legally entitled to refuse to give effect to an award of compensation made by the Administrative Tribunal, properly constituted and acting within the limits of its statutory competence '; farther on in the Opinion it is added that ' the previous observations of the Court are based upon that ground '.

" To this formula it would, in my opinion, be necessary to add a third element to complete it correctly: the Tribunal, properly constituted, acting within the limits of its statutory competence and in accordance with the rules of its procedure. The Opinion states that ' in none of these reports or relevant records is to be found any suggestion indicating that the Tribunal, when rendering its awards in those eleven cases, was not legally constituted ', but it might with equal reason be added: or that it disregarded any essential rule of its procedure. In any event, I understand the Opinion as contemplating awards which are not nullities, and I was accordingly able to vote with the majority, for, like the majority, I consider that the General Assembly has not the right to refuse to give effect to an award where the ground on which it relies is merely an incorrect application of the law or a mistaken finding or appraisal of the facts.

" Having thus construed the question to which the answer is given in its operative part, the Advisory Opinion then refers to the following hypothesis which, in my view, goes beyond the ground upon which the observations of the Court are based: ' If, however, the General Assembly, by inserting the words "on any grounds", intended also to refer to awards made in excess of the Tribunal's competence or to any other defect which might vitiate an award, there would arise a problem which calls for some general observations.'

" I regret to be unable to associate myself with these observations; and as they make it necessary for me to clarify my vote, I am compelled to append to the Advisory Opinion certain considerations which briefly summarize my point of view.

" It is said in the Opinion that the problem envisaged by this hypothesis would not raise the question of the nullity of arbitral awards made in the ordinary course of arbitration between States, for the present case concerns judgments pronounced by a permanent judicial tribunal established by the General Assembly, functioning under a special statute adopted by the General Assembly and within the organized legal system of the United Nations. If this passage refers to a judgment vitiated by such defects as to be a nullity, I can see no difference between the nullity of an arbitral award and that of an award made by the Administrative Tribunal. An arbitral award, which is always final and without appeal, may be vitiated by defects which make it void; in this event, a party to the arbitration will be justified in refusing to give effect to it. This is not by virtue of any rule peculiar to ordinary arbitration between States; it is a natural and inevitable application of a general principle existing in all law: not only a judgment, but any act is incapable of producing legal effects if it is legally null and void. The Administrative Tribunal, organized as it is, for important practical reasons, is a permanent tribunal made available by the United Nations and accepted by staff members under a contract freely entered into. It does not and cannot constitute an exception to the general rule. Its judgments are final and without appeal; but this provision of the Statute says what it says, and the Opinion quotes the Statement of the rapporteur of the Fifth Committee of the General Assembly when the draft Statute of the Administrative Tribunal was under discussion. Indicating that there would be no appeal from the decisions of the Tribunal, the rapporteur, at the meeting on November 15th, 1946, referred to delay in 'the final decision in a case . . .' if there should be 'appeal beyond the Administrative Tribunal'. There can be no appellate procedure in the absence of an express provision which must in the first place establish an appellate tribunal. But appeal is one thing, and refusal to give effect to a judgment which is a nullity is another. The view that it is only possible for a party to rely on the rule relating to nullities where some procedure for this purpose is established, finds no support in international law. Such a procedure may be established *ad hoc* between States, as it was in the *Orinoco Steamship Company* case; it was established in the case of the Administrative Tribunal of the International Labour Organization; but the absence of an organized procedure does not do away with nullities, and there is no warrant for the idea that there can be no nullity if there is no appropriate court to take cognizance of it. Nor is it necessary that the principle, in accordance with which a party is entitled to refuse to give effect to a judgment which legally is a nullity, should be enunciated in any express provision.

"It is, however, possible that when it considered the hypothesis which has given rise to this Individual Opinion, the Advisory Opinion was contemplating simply an established system of review, review in the sense of a further consideration of the case, and this seems to be so in view of the last lines of the paragraph referred to: 'the Court is of opinion that the General Assembly itself . . . could hardly act as a judicial organ—considering the arguments of the parties, appraising the evidence produced by them, establishing the facts and declaring the law applicable to them'. Here, the Opinion seems to be contemplating a consideration on appeal and perhaps in proceedings to have a decision quashed, but this is outside the scope of the question referred to the Court by the General Assembly, which is not concerned with a review of this sort but merely with a refusal to give effect to an award."

In his Dissenting Opinion Judge Alvarez said, in part, as follows:

"My basic assumption is that the question referred to the Court relates to the international organization established by the Charter of the United Nations; it is therefore a problem of politics and of the new international law, which must be resolved in accordance with those elements and having regard to a new criterion.

"Before we show in what respect the problem belongs to the domain of the new international law and before we deal with the solution which should be given to it in accordance with that law, let us consider how it would be resolved by classical international law.

"Before 1914 there were no arbitral tribunals operating on a permanent basis; there were merely occasional arbitrators who adjudicated upon disputes regarding specific matters. A distinction had to be made between appeals against such awards and their performance.

"As regards appeal, this was provided for in the arbitration agreement, which usually stipulated that revision might be undertaken by the arbitrator in certain cases.

"And as regards the performance of the award, the practice was that it was carried out in good faith; but if it contained grave defects and in particular if the arbitrator had acted *ultra vires*, the party concerned could refuse to give effect to the award. Such a refusal, moreover, might give rise to a new dispute between the parties.

" These precedents of arbitral tribunals finally gave rise to a principle of classical international law to the effect that a party might refuse to give effect to an arbitral award if the award contained grave defects.

" If classical international law is applied to the case now before the Court, there can be no doubt as to the solution: the General Assembly of the United Nations must not give effect to awards of the Administrative Tribunal if it considers that they are vitiated by some important defect.

" But now that, in addition to arbitral tribunals, the International Court of Justice, which is permanent in character, has come into existence, the question of the review and performance of arbitral awards must be resolved, having regard to the new conditions of arbitration as well as to the new conditions of international life in general.

" In this connection, it is necessary to proceed on the basic assumption that, following the last two social cataclysms in particular, rapid and profound transformations have occurred in the life of peoples and in the traditional or classical international law, which have not been sufficiently appreciated. By reason of the extent of these changes, a new *epoch*, a new *era* has opened in the life of peoples and in the traditional or classical international law.

"A rapid review of these transformations will serve to show how important they are.

" Until the two last world wars, all the States formed a mere *community* and there existed between them no links other than those which had been freely accepted. Since then, and as a result of a number of circumstances, particularly the ever-increasing relations between States, the complexity and variety of those relations, the great number of international services created by the States, as well as the increasing dynamism of the life of peoples, this community has been transformed into a real *international society* which includes all the States of the world. This transformation has taken place without any convention or solemn act being required for that purpose.

" There are great differences between the old community and the new international society.

" Without expatiating on this point, I shall merely indicate that in the new international society the psychology of peoples has been deeply modified from a two-fold point of view. Certain peoples who for centuries had followed a traditional course, adopted new ways of life and embraced, almost abruptly, a political, social and economic régime which was entirely different from the one that had hitherto prevailed. This is particularly true of Russia, where the Soviet regime was born. Since that time there has also been an awakening among many peoples of Asia, Oceania and North Africa who are desirous of casting off what they call the European yoke. In this way more than half of the world to-day has, particularly from the international point of view, a psychology which is very different from what it formerly was.

" Furthermore, all the peoples now understand that they are no longer isolated or bound only by the instruments which they have freely accepted, but that they are a part of a real society which is broader than the civil community to which they belong and which limits their absolute sovereignty.

"As a result, the classical international law which governed the old community has been modified from several points of view. First, it has established, in many respects, a new legal order by creating certain rights and duties which States did not formerly have; secondly, international law must henceforth have primacy over national law, a fact which was formerly challenged; and finally, international law has undergone considerable change in so far as the concept of that law and its essential facts are concerned; it is no longer exclusively *juridical* and *individualistic*, as was classical international law; it now assumes a *political* and *social* character as well.

" The profound modifications in international life and in international law which I have just outlined are not the mere expression of doctrine or legal speculation, as might be thought at first sight; what are involved are facts, declarations, and bases recognized by the Charter of the United Nations, particularly in its Preamble and in Chapter I.

" The *political* character of international law has been recognized, at least by implication, by the Third Assembly of the United Nations, when it debated the Advisory Opinion of the Court in the matter of the Admission of New Members to the United Nations.

" The *social* character of the international law of to-day is a result of the new *régime of inter-dependence* which has emerged and which tends to replace the traditional *individualistic* régime. Having regard to this *social* character, what may be called the new international law is particularly concerned with the maintenance of peace and the development of confidence and co-operation between States; it assigns an important place to the general interest and condemns *abus du droit*; it also has a new aim: the well-being of the individual and of society.

" The Charter applies this social law in a number of its provisions, particularly in Chapters IX to XIV. It was also applied in some of the decisions of the International Court of Justice and in the work of the Codification Commission in the preparation of regulations governing certain matters.

" Finally, a further characteristic of the international society is that it has been organized by the Charter of the United Nations. The Charter has established six principal organs, including, with particular reference to the matter we are considering, the General Assembly and the Secretariat (Art. 7). And Article 22 provides that ' The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions '.

" The principal organs play the most important part in the new international society; almost all the activity of that society is concentrated in those organs. The only purpose of the subsidiary organs is to assist the principal organs to discharge their duties.

" One fact must be particularly stressed and that is that the organs and agencies established by the Charter—as, indeed, all social institutions —evolve more or less rapidly in accordance with the new conditions of the life of peoples; this evolution to-day constitutes a real sociological or social law.

"As regards the subject we are here considering, I shall confine myself to the evolution of the General Assembly of the United Nations. This evolution is characterized by a number of factors which transform the Assembly into an all-powerful legislative organ.

" First, the Assembly tends to be in almost permanent session.

" Secondly, the Assembly is becoming a real international legislative power for, apart from *recommendations* made to States, it adopts *resolutions* whose provisions are binding on them all. This fact is of great importance for the future of international law.

"A number of publicists and statesmen have expressed the desire for the establishment of an international legislative power: in fact such a power already exists.

"A third tendency of the Assembly of the United Nations is to intervene more and more in the solution of the great international problems which arise. To-day, whenever a difficult situation presents itself in international life, its reference to the General Assembly for consideration is always envisaged.

"A fourth tendency relates to the formation, within that Assembly, of a special psychology in international matters. Indeed, when the States meet in the Assembly—except in cases involving their vital interests—the juridical conscience of peoples is developed there, along with the new conception of law and of justice.

" This conscience gives rise either to legal principles—in other words, principles whose observation can be required, and they are then principles of *social law* or more properly, of the international *law of social interdependence*—or merely to moral principles and, these constitute *international* social justice. The latter may become principles of law by means of resolutions of the General Assembly of the United Nations, or by decisions of certain international organs, such as the International Court of Justice, which, in respect of a given matter, may declare that a certain principle of international social justice should be established in positive terms and applied as the law in force.

"And, finally, the General Assembly of the United Nations tends to be guided by the notion of social law and international social justice in its work and resolutions, as has already been pointed out above.

" This character, this omnipotence which has been acquired by the General Assembly of the United Nations is to be explained by the fact that it is made up almost permanently of representatives of most of the countries of the world, whereas this was not formerly the case.

" The Assembly constitutes the supreme power; it is bound only by the Charter which established it, or by its own resolutions. There is nothing above the Assembly except moral forces, particularly public opinion, which may censure the acts of the Assembly if it considers them open to criticism.

"A logical and practical consequence of the foregoing is that any attempt to limit the power of the General Assembly of the United Nations would run counter to the realities of international life.

"A further very important consequence is that in the solution of international problems that may arise in the future, regard may no longer be had—as was hitherto the case and as was done by a number of governments in their opinions, to which reference has already been made—for diplomatic precedence, international awards, preparatory work or the views expressed by delegates during the debates relating thereto. In international life there can no longer be any looking backwards, although this was admissible when international life scarcely moved forward; the dynamism of that life makes it necessary to look ahead.

" The great transformations in international life and in international law which I have just indicated in summary form are so important that they deserve special consideration with regard to the solution of the question put to the Court.

" First, the Administrative Tribunal was established by reason of the fact that the Secretariat of the United Nations consists of some thousands of staff members who were engaged under contracts which may give rise to disputes between the Secretariat and the staff members. These disputes are not decided by the General Assembly of the United Nations—this would burden it unduly; nor by the International Court of Justice—this would increase its task considerably; nor by any other tribunal. Accordingly, the General Assembly considered it necessary to establish a subsidiary organ in accordance with Article 22 of the Charter.

" Certain governments in their opinions, and the Court itself, have sought at considerable length to prove that the General Assembly had the capacity to establish that organ; in my opinion, the Assembly clearly had that capacity by virtue of Article 22 quoted above and by virtue of the omnipotence of the Assembly.

" The name of this organ is especially significant: ' The United Nations Administrative Tribunal '.

" What is involved is, indeed, a *tribunal* and not—as alleged by certain governments—a mere advisory body of the Assembly because, under the terms of its Statute, the Tribunal delivers binding judgments; it is not, however, a judicial tribunal: it is an *administrative* tribunal because it deals only with specific questions in that field, which, in the first instance, fall within the purview of the General Assembly which established the Tribunal to assist it in the discharge of its duties.

" The members of the Tribunal are appointed by the General Assembly and the Statute of the Tribunal was drawn up by the Assembly.

" It is self-evident that the Tribunal has no competence other than that conferred upon it expressly by the Assembly; the Tribunal's competence is indicated in Article 2 of its Statute: its particular task is to settle disputes arising out of contracts of employment entered into between the Secretariat and the staff members of the United Nations.

"Article 10, paragraph 2, of the Statute provides that ' the judgments shall be final and without appeal '; and Article 9 provides that ' in any case involving compensation, the amount awarded shall be fixed by the Tribunal and paid by the United Nations. . . . '.

" It is to be noted that the Statute of the Administrative Tribunal does not provide for any means of appeal against the awards; nor does it indicate how effect is to be given to the awards.

" There is therefore a difference between the Tribunal and the International Court of Justice in this respect.

" The judgments of the International Court of Justice, which is the principal judicial organ of the United Nations (Art. 92 of the Charter), are ' final and without appeal ' (Art. 60 of the Statute of the Court), but provision is made for revision or interpretation by the Court in certain cases (Arts. 60–61 of the Statute).

"As regards compliance with the decisions of the Court, the interested party may, in accordance with Article 94 of the Charter, have recourse to the Security Council ' which may, *if it deems necessary*, make *recommendations* or decide upon *measures to be taken* to give effect to the judgment.'

" The carrying out of the judgments of the Court is thus dependent upon the Security Council, which may make a decision in this respect, as has just been pointed out.

" Since the Statute of the Administrative Tribunal contains no provision for the review of its awards and no provision relating to their performance, do those awards automatically bind the Assembly so that the Assembly must always give effect to them even when they are vitiated by a patent defect, such as excess of powers or manifest injustice ? Obviously not.

" It is inadmissible that a principal organ of the United Nations, such as the General Assembly, which has very broad powers, should be bound passively to give effect to all the awards of a tribunal which it has established. The Assembly is bound to do so only in cases in which the Tribunal has acted within the limits of its competence. But if the Assembly considers that the Tribunal has acted *ultra vires*—for example, if it grants an amount of compensation which is higher than the amount claimed, or if the compensation has been awarded without valid grounds, or if the Tribunal has committed an *abus du droit*—then there can be no doubt that the Assembly can refuse to give effect to the award by not providing for the amount of compensation in the budget of the Organization; but in such a case the Assembly is bound to indicate expressly the grounds for its refusal, failing which its attitude would be open to criticism.

"As I have already pointed out above, it is a principle of classical international law—and also of modern international law—that the awards of tribunals are not binding when they are vitiated by some defect, as, for example, when the tribunal has acted *ultra vires*, and that accordingly the parties may refuse to give effect to them. In order to make the awards binding in such cases, an express provision would be required in the instrument providing for the constitution of the tribunal. But no such provision exists in the case of the Administrative Tribunal.

" What the Court said in its Advisory Opinion in the matter of Reparation for Injuries suffered in the Service of the United Nations is perfectly applicable here; the relevant passage which is quoted in the present Advisory Opinion by the Court in support of other assertions is as follows: ' Under international law, the Organization (the Assembly in the present case) must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implications as being essential to the performance of its duties ' (I.C.J. Reports 1949, p. 182).

" The General Assembly of the United Nations which, as has been pointed out above, must constantly be guided by the notion of international social justice, cannot passively agree to give effect to the awards of a subsidiary organ which it has established if those awards are vitiated by a patent defect.

" Furthermore, the nature of the Tribunal is such that its decisions do not have the same scope in respect of the applicant as they do in respect of the respondent, or the General Assembly of the United Nations. They are binding on the applicant since he resorted to this Tribunal, which was especially created to deal with his complaints and which, moreover, is the only tribunal in existence for this purpose; but the decisions of the Tribunal are not binding upon the General Assembly, which may refuse to *give effect to* them if it considers that there are valid reasons for such a refusal. By acting in this way, the Assembly is not setting itself up as a court of appeal; nor does it proceed to review the awards: it is merely exercising a right which it has to supervise the performance of the judgments of the Administrative Tribunal which it has established. To deny this right to the Assembly would be tantamount to placing the Tribunal above the Assembly, which is inadmissible.

"A concrete case may arise which would fully justify the foregoing assertion: it is the opposite case to the one usually considered. Let us suppose that the Assembly should consider that an application is well-founded which the Administrative Tribunal has found to be inadmissible. Could it then be argued that the General Assembly is not entitled to sustain this application ? This is a question which answers itself.

" Furthermore, a considerable change may occur in the economic or social conditions between the date of the giving of the award and that of its performance, which might entirely alter the scope of the award, for example, if there should be an abrupt fluctuation in the value of the dollar, the currency in which the amount of compensation is fixed, resulting in a considerable modification in the real value of the compensation. Should the Assembly remain passive? Should it not have the power to refer the matter back to the Tribunal for necessary adjustment, or should the Assembly itself not have the power to make such an adjustment ?

" Finally, it may happen that an award of compensation has been validly made, but that the Assembly has no funds available for that purpose; the Assembly must then decide how the payment shall subsequently be made.

" The Assembly must make provision in the budget of the United Nations for the following expenditure: first, all expenditure relating to bodies established by the Charter, for the Assembly is bound to respect the provisions of the Charter; secondly, all other expenditure deemed necessary by the Assembly, as well as that arising from the performance of the obligations contracted by the Organization; and finally, the compensation to be paid in pursuance of those awards of the Administrative Tribunal which the Assembly regards as justified.

" In short, the Assembly is sovereign in the matter of the drawing up and adoption of the budget of the Organization; there is no appeal against the decisions of the Assembly and the only sanction in respect of its actions is the criticism of public opinion.

" For the foregoing reasons, I give the following answers to the questions referred to the Court:

" In reply to Question (1), I am of opinion that the General Assembly has the right to refuse to give effect to an award of compensation made by the United Nations Administrative Tribunal if it considers that there are serious grounds justifying such a refusal.

" In reply to Question (2), I am of the opinion that the grounds on which the General Assembly is entitled to refuse to give effect to such an award are, in particular, if the Tribunal has acted *ultra vires* or if there has been manifest injustice especially if in conflict with the concept of international social justice, or a violation of the great principles of international law."

In his Dissenting Opinion Judge Hackworth said:

" I regret that I am obliged to dissent from the Opinion of the Court in the present case.

" Two questions are presented to the Court. The first is whether the General Assembly has the right ' on any grounds ' to refuse to give effect to an award of compensation made by the United Nations Administrative Tribunal in favor of a staff member of the United Nations whose contract of service has been terminated without his assent.

" The second question, which requires an answer only in the event of an affirmative answer to the first one, asks for a statement of the principal grounds upon which the General Assembly could *lawfully* exercise such a right.

" The United Nations Administrative Tribunal was established by Resolution 351 (IV) adopted by the General Assembly on November 24th, 1949, approving a Statute by which the Tribunal was to be governed. It was given authority to pass upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of their appointment. The words ' contracts ' and ' terms of appointment ' were declared by Article 2 of the Statute to include ' all pertinent regulations and rules in force at the time of alleged non-observance including the staff pension regulations '.

" The present questions arise primarily by reason of provisions contained in Articles 9 and 10 of the Statute.

" Article 9 states, *inter alia*, that:

'. . . In any case involving compensation, the amount awarded shall be fixed by the Tribunal and paid by the United Nations, or, as appropriate, by the specialized agency participating under Article 12[1].'

" Article 10 states in paragraph 2 that the ' judgments shall be final and without appeal '.

" It is these provisions concerning payment of monetary awards and the finality of judgments, that have given rise to the questions on which advice of the Court is requested.

" The question, ' has the General Assembly the *right* . . . to refuse to give effect to an award of compensation . . . ' must be understood as meaning a legal right. This follows from the fact that the Court is authorized to give Advisory Opinions only on legal questions (Article 65 of the Statute), and also from the request in the second question for a statement of the principal grounds upon which the General Assembly could ' lawfully ' exercise such a right.

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[1] Article 12 makes provision for extension of the competence of the Tribunal to specialized agencies under certain conditions.

" We might content ourselves by looking to the language of the Statute of the Tribunal and applying common canons of statutory construction. By this process it might be said that the language of the Statute is clear and unambiguous and consequently lends itself to but one construction, namely, that the Tribunal's decisions are final and without appeal and that the Assembly is obligated to pay any monetary award given by the Tribunal. Such a process would constitute an over-simplification of the problem. Indeed the Assembly's request asks the Court to have regard not only to the Statute of the Administrative Tribunal but also to ' other relevant instruments and to the relevant records '.

" When we are considering the legal implications of any action taken by an organ of the United Nations, the Charter of the Organization is naturally a relevant instrument. It is the instrument by which the powers and duties of the organs of the United Nations have been delineated. It is the instrument by which the respective Organs are governed. It is, in short, the organic law—the Constitution of the Organization.

" By this instrument the Organization has allocated to its principal organs their respective fields of operation. Action taken by an Organ must find its justification within the compass of the powers and duties there stated. It must of necessity be weighed in the light of, and reconciled with, the powers and duties conferred upon that organ by the Charter.

" The matter with which we are here concerned relates to functions of two of the principal organs of the United Nations—the General Assembly and the Secretariat.

" The Secretary-General is the principal administrative officer of the United Nations, and he and the staff under him go to make up the Secretariat (Article 97).

" The Secretary-General makes the appointments but he must do so under regulations prescribed by the General Assembly. They have separate functions, but they also have a joint responsibility. That joint responsibility is to assure that ' in the employment of the staff and in the determination of the conditions of service . . . the highest standards of efficiency, competence and integrity ' shall be secured (Article 101).

" Although it is not so stated, it may be assumed that it was for the purpose of meeting this requirement of a high standard of efficiency, of which harmony within the Secretariat is an essential element, that the Administrative Tribunal was created. It is in relation to disputes between the Secretary-General and members of the staff that the Tribunal was given competence by Article 2 of the Statute.

" We now come to the question concerning the nature of the Administrative Tribunal to which much attention has been devoted in both the written statements and the oral presentations by the various governments.

" Article 7 of the Charter, after listing the principal organs of the United Nations, states in the second paragraph that:

'Such subsidiary organs as may be found necessary may be established in accordance with the present Charter.'

"The statement 'in accordance with the present Charter' is given definite expression in Articles 22 and 29 by which the General Assembly and the Security Council, respectively, are authorized to establish subsidiary organs.

"Article 22 provides:

'The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions.'

"It must be concluded, therefore, that when the General Assembly approved the Statute creating the Administrative Tribunal it did so in the exercise of its authority under Article 22. Nowhere else in the Charter is any such authorization to be found. And nowhere else in the Charter can there be found any authorization, express or implied, for the establishment by the General Assembly of any other kind of organ be it judicial, *quasi* judicial or non-judicial.

"At this point it is pertinent to refer to the *travaux préparatoires* of the San Francisco Conference.

"The draft of Article 22 as it emanated from the appropriate Committee at San Francisco stated that the Assembly might create '. . . such *bodies* and *agencies* as it deems necessary for the performance of its functions'. This followed the wording of the Dumbarton Oaks Proposals.

"This draft was later changed to its present wording in order that it might conform to Article 7 *supra*, of the Charter. It was approved by the Conference as changed and as it now reads. There is, therefore, no point to saying that the Statute of the Tribunal is based on Article 101 of the Charter, as has been argued, and as so based is relieved of the consequences of Article 22. That argument must be dismissed as without legal justification.

"The reasonable deduction, then, is that the Administrative Tribunal is a *subsidiary* organ of the General Assembly, created by an act of the Assembly, pursuant to the authorization in Article 22.

"Two questions are here presented. One relates to the meaning of 'subsidiary organ', and the other concerns the expression 'necessary for the performance of its functions'—meaning functions of the General Assembly.

"The term 'subsidiary organ' has a special and well recognized meaning. It means an auxiliary or inferior organ; an organ to furnish aid and assistance in a subordinate or secondary capacity. This is the common acceptation of the meaning of the term.

"The expression 'necessary for the performance of its functions' means performance by the General Assembly of its functions under the Charter.

"It was recognized by the framers of the Charter that with the multiplicity of duties assigned to the General Assembly the assistance of different types of subsidiary organs would be needed, hence the provision in Article 22 giving the Assembly the authority to provide this assistance. But nowhere in the Charter is there to be found any suggestion or intimation that the General Assembly might abdicate any of its functions or that it might reassign them to some other organ or agency in such manner as to relinquish its control over the subject-matter.

" It is equally unrealistic to assume that a *subsidiary* organ with certain delegated authority could bind the principal organ possessing plenary powers under the Charter. This would present an anomalous and unique situation in international organization—a situation that can find no sanction, express or implied, in the Charter. The aims and purposes of the Charter must not be obscured or frustrated by such a phenomenon. The whole idea of the Charter was that the role of subsidiary organs should be, as the name implies, to assist and *not* to control the principal organ. Any other view, if accepted, would render extremely hazardous the creation of subsidiary organs, unless their powers were severely circumscribed. The principal organ must continue to be the principal organ with authority to accept, modify, or reject, the acts or recommendations of the subordinate organs if the former is not to become *functus officio* in any given field.

" To conclude that the General Assembly, by conferring upon the Administrative Tribunal certain authority in administrative matters is now estopped to question any action of the Tribunal which it created, would be to penalize the Assembly for having been less guarded than it might have been in trying to give to members of the staff, by establishing the Tribunal, assurance of its desire that they should have fair treatment. But any such assurance must be understood and accepted with knowledge that in the final analysis the General Assembly is the supreme authority. Any act by the Assembly which might seem to be open to a different construction must be considered in the light of this background to the end that the Charter shall be preserved in its present form unless and until it shall have been amended in the manner contemplated by Chapter XVIII.

" One cannot lightly assume that the Assembly, in approving the Statute of the Administrative Tribunal, had any intention of inhibiting itself from acting where action might be needed. A reasonable approach to the problem in which the Charter as well as the Statute of the Tribunal are given their proper places will avoid any such assumption. We cannot reach a sustainable conclusion by examining the Statute in isolation. This undoubtedly was recognized by the Assembly when in its Resolution it asked the Court to have regard ' to the Statute of the United Nations Administrative Tribunal and to any other relevant instruments '. Certainly the Charter is a relevant instrument. All other instruments, including the Statute, must be viewed in the light of and with due regard for the Charter.

" In support of the contention that the General Assembly is without power to review decisions of the Administrative Tribunal it has been said that the Statute contains no reservation of such right. This argument is by no means convincing. I can readily admit that such a reservation might have simplified matters as they have since developed, but I cannot admit that such a reservation was at all necessary. The nature of the Tribunal, the method by which it was created and the purpose for which it was created belie any such notion. Any and all power not specifically delegated, including the power of review, was, as a matter of law, reserved to the Assembly.

" It has also been emphasized that in establishing the Administrative Tribunal the General Assembly relied, or had the right to rely, upon certain implied powers under the Charter, and in particular the power to implement Article 101, paragraph 3, concerning the maintenance of a high standard of efficiency, etc. This, it is said, necessitated the establishment of a judicial Tribunal. The argument is not persuasive.

" The doctrine of implied powers is designed to implement, within reasonable limitations, and not to supplant or vary, expressed powers. The General Assembly was given express authority by Article 22 of the Charter to establish such subsidiary organs as might be necessary for the performance of its functions, whether those functions should relate to Article 101 or to any other article in the Charter. Under this authorization the Assembly may establish any tribunal needed for the implementation of its functions. It is not, therefore, permissible, in the face of this express power, to invoke the doctrine of implied powers to establish a tribunal of a supposedly different kind, nor is there warrant for concluding that such a thing had resulted. It is of little consequence in the end result whether the Tribunal be described as a judicial, an arbitral or an administrative tribunal—which it is in fact called. No controlling significance is to be attached to the name or to the functions of the Tribunal.

" On this first phase of the problem, then, I conclude that the Administrative Tribunal is a subsidiary organ of the General Assembly, and that decisions of the Tribunal are not immune from review by the Assembly, should occasion for such review arise.

" In order the more clearly to understand the legal position of the Assembly vis-à-vis decisions of the Tribunal, it will be convenient to consider Articles 9 and 10 of the Statute in the inverse order, since if the provisions of Article 10 concerning the finality of judgments do not apply to the Assembly, arguments relating to supposed obligations under Article 9 lose much of their force.

" The purpose to be served by the Administrative Tribunal is well known. It was to afford a remedy to members of the staff who might have a grievance against the Secretary-General, based on an alleged non-observance by him of their contracts of employment.

"Within this limited field the Tribunal undoubtedly has competence to give decisions, which by Article 10 are declared to be ' final and without appeal '.

" But this competence and this finality of decisions are not determinative of the broader question before the Court, that is to say, whether decisions of the Tribunal are binding on the United Nations in general and on the Assembly in particular.

" It is common knowledge that decisions of a tribunal, be it a judicial or other tribunal, are binding only on the parties to the cases before it. This is but a statement of a general rule of law which finds expression in concrete form in Article 59 of the Statute of this Court, providing that:

' The decision of the Court has no binding force except between the parties and in respect of that particular case.'

" Now who are the parties to a case coming before the Administrative Tribunal?

" The parties are the applicant (the staff member) on the one hand, and the Secretary-General or the specialized agency, as the case may be, on the other hand. This is made abundantly clear by the history incident to the creation of the Tribunal. It is made equally clear by Articles 9 and

12 of the Statute, by the Rules of procedure adopted by the Tribunal, and by the cases that have come before it.

" The applicant is the party plaintiff and the Secretary-General, or the specialized agency, is the party defendant. The captions of the cases are: ' [Name of staff member], Applicant, *vs* the Secretary-General of the United Nations, respondent '. These parties are consistently referred to by the Tribunal as the ' applicant and respondent ' or as the ' two parties '. The subject-matter is a contested decision or action of the Secretary-General or of the specialized agency, as the case may be.

" But is the General Assembly or the United Nations, as such, also a party to these cases?

" It is difficult to see how this could be. The staff member has no complaint against the Assembly or against the United Nations Organization. His complaint is against the Secretary-General. It is he who is alleged to have failed in some manner properly to honor the contractual rights of the staff member.

" But it has been said that the Secretary-General represents the Organization and that therefore the Organization is responsible for his acts.

" It is possible to carry this argument much too far. It is true that the Secretary-General is the chief administrative officer of the United Nations and that in that capacity he acts for the Organization. His official acts, in so far as concerns transactions between the Organization and outside entities, personal or juristic, such as contracts for the purchase of supplies and equipment, contracts for services, the lease of premises, etc., when performed within the scope of his authority, engage the responsibility of the Organization. These activities are governed by private law concepts. Disputes concerning them are the kind of disputes which, by Article VIII, Section 29, of the Convention of 1946 on the Privileges and Immunities of the United Nations, the United Nations was authorized to ' make provisions for appropriate modes of settlement ' (1, U.N. Treaty Series (1946–1947), 16, 30.)

" But there is another category of activities in which the Secretary-General functions in quite a different capacity. This category pertains to the internal affairs of the Organization. This is a purely *intra*-organizational field. Operations within this field are not governed by private law concepts. They are governed by provisions of the Charter, and by regulations made pursuant to the Charter. It is within this field that disputes between staff members and the Secretary-General fall. They, to apply an analogy in international law, are disputes of a domestic character.

" The Secretary-General and the staff, as we have seen, constitute the Secretariat, one of the principal organs of the United Nations. Disputes between members of the staff and the Secretary-General are disputes between component parts of that organ. They are not disputes between two organs of the United Nations, or between a principal organ, on the one hand, and the United Nations, on the other hand. They are not disputes between staff members and the United Nations as such or between staff members and the General Assembly.

" If, then, they are not disputes between the staff member and the United Nations or between the staff member and the General Assembly, and if neither the United Nations nor the General Assembly is a party to a case coming before the Administrative Tribunal, where lies the justification for concluding that either is bound by a decision of the Tribunal?

" It must follow, as a matter of law, that the statement in Article 10 of the Statute that decisions of the Tribunal shall be final and without appeal can only mean that they shall be final and without appeal as between the parties to the case, and neither the United Nations nor the General Assembly may be regarded as a party.

" This brings us to a consideration of Article 9 of the Statute, stating that any award of compensation by the Tribunal shall be paid by the United Nations.

" Here again, it does not suffice to look at the Statute alone and to apply to the language there used the ordinary rules of statutory construction. We cannot, as stated above, examine the Statute in isolation. We must examine it in the light of other relevant instruments. The Charter is such an instrument. The duty of a court when faced with apparent incompatibility between a legislative enactment and the constitution (the Charter) is to try to reconcile the two. If this cannot be done the constitution must prevail.

" The functions of the General Assembly as they were stated in the Dumbarton Oaks proposals were revised and elaborated at the San Francisco Conference. But throughout the discussions from Dumbarton Oaks to the signing of the Charter at San Francisco, the General Assembly was recognized as the organ of the United Nations to which should be entrusted the over-all control of the fiscal affairs of the Organization. It was given authority to 'consider and approve' the budget, and to apportion among the Member States the 'expenses of the Organization' (Article 17). It is both the taxing authority and the spending authority. In its relationship to the Organization it occupies a status of a *quasi* fiduciary character.

" In the performance of these dual functions of raising and disbursing revenue, the General Assembly acts for and on behalf of the Organization. The importance which the Organization attaches to the exercise of these functions is shown by Article 18 of the Charter with respect to voting in the General Assembly. It is there stated that each Member shall have one vote, and that decisions on 'important questions' shall be made by 'two-thirds majority of the members present and voting.'

" As a guide to the General Assembly in determining what questions should be regarded as important, and hence as requiring this two-thirds majority vote, there is set forth in Article 18 a list, not all inclusive, but a representative list, of subjects deemed by the Organization to occupy a pre-eminent position. Included in this list are 'budgetary questions'. This, then, clearly shows the importance attached by the parties to the Charter, to the fiscal affairs of the Organization. Indeed, budgetary or fiscal affairs of any organization, be it a national government, a municipality, a private corporation, a social or an eleemosynary institution, are elements of preoccupation in the life of the Organization.

" Various methods of supervising fiscal affairs of national and lesser organizations with their checks and counter-checks have been devised. In the case of the United Nations, control over both the raising of revenue and of its expenditure is vested in the General Assembly. All Members of the United Nations have a direct interest in what the Assembly does in these matters. Their own national budgetary problems may be affected by wise or unwise expenditures made on their behalf by the General Assembly.

" This brings us more directly to the focal question presented in the request for an opinion: Has the General Assembly the ' right on any grounds to refuse to give effect to an award of compensation made by ' the Administrative Tribunal in favor of a staff member of the United Nations whose contract of service has been terminated without his assent ?—or, stated in another way: Has the General Assembly, by approving the Statute of the Administrative Tribunal, deprived itself of the right to exercise its normal functions under the Charter, and in particular those pertaining to budgetary questions?

" Those who have contended that awards by the Administrative Tribunal must be effectuated by payments, have advanced various reasons in support of their contentions, among them being the theory that a contractual relationship is established between the staff member and the United Nations, by reason of the fact that the Administrative Tribunal is referred to in the Staff Regulations (Regulation 11.2; as adopted by General Assembly Resolution 590 (V) of 2 February 1952 and amended by Resolutions 781A (VIII) and 782 (VIII)); also that the Tribunal is a judicial organ whose decisions must be respected.

" These arguments do not go to the root of the question. Regulation 11.2 merely states that:

' The United Nations Administrative Tribunal shall, under conditions prescribed in its statute, hear and pass judgment upon applications from staff members alleging non-observance of their terms of appointment, including all pertinent regulations and rules.'

" It is difficult to see how this may be said to establish a contractual relationship between the staff member and the United Nations, placing upon the latter a duty to pay all judgments given by the Tribunal, regardless of their nature. Moreover, those who make this contention admit that the Assembly may at any time change the staff regulations. In fact, it is specifically stated in the Staff Rules (Chapter IV, Annex II (*a*) (i)) that the appointment is subject to changes ' made in such regulations and rules from time to time '.

" The fact, if it be a fact, that the Administrative Tribunal is a judicial organ, does not place upon the Assembly an obligation to appropriate funds under Article 9 of the Statute in a *pro forma* manner. In the exercise of its budgetary authority the Assembly acts as a deliberative body with complete discretionary power to approve or refuse to approve any budgetary item, as in its judgment the interests of the United Nations and of good administration shall require. It is not permissible to conclude that by Article 9 of the Statute the Assembly has given, or ever intended to give, prior blanket approval to unpredictable amounts called for by awards of the Tribunal. There is no justification for ascribing to the Assembly such a broad curtailment of its constitutional functions.

" In the final analysis the Administrative Tribunal, regardless of what we may call it, is *not* an organ created by the Charter. It does not have a constitutional status co-ordinate with the General Assembly. Precisely it is, as previously stated, a ' subsidiary organ ' of the Assembly.

" But it has been urged that an award by the Administrative Tribunal establishes for the United Nations a debt or legal obligation, and for the staff member an acquired or vested right.

" These conclusions must presuppose the existence of a valid award. No debt or legal obligation, having a fixed juridical status, may be said to result from an unjust judgment, nor can any acquired or vested right be said to result from such a judgment.

" We may admit the existence of a right to have recourse to the Administrative Tribunal for the adjudication of a complaint, but an award by the Tribunal does not *ipso facto* create an obligation for the United Nations or a vested right in the staff member.

" As a further argument in support of the thesis that the awards are binding on the Assembly it has been urged that by Article 9 of the Statute the Assembly has committed itself to the payment of monetary awards. But are we to conclude from this that Article 9 means that the Assembly has agreed to pay any and all awards regardless of whether they may, for some legitimate reason, seem to the Assembly not to merit that treatment ? Does it mean that the Assembly has estopped itself from looking into an award which on its face may be open to question ? Finally, does it mean that the Assembly has surrendered part of its functions in budgetary matters to a subordinate agency whose decisions it must honor by appropriations even though it may not agree with them? These questions seem to supply their own answers.

" It is common knowledge that courts of law and other tribunals, however praiseworthy their intentions may be, are not infallible. In recognition of this fact appellate tribunals are usually provided. In this instance the Administrative Tribunal is the sole tribunal. There is, therefore, all the greater reason for rejecting the contention that the General Assembly has lost all control and is completely at the mercy of the Tribunal in the absence of incontrovertible evidence that such is the case.

" If it be concluded that by Article 9 of the Statute the Assembly has surrendered its discretionary authority in budgetary matters to the extent of awards made by the Tribunal, and that it must appropriate the necessary funds to satisfy such awards, then, there is nothing in the Charter which would prevent the Assembly from making similar commitments to other subsidiary organs and thus gradually to whittle away all control in a field where it has been given complete control.

" The Assembly is charged by the Charter with a duty to ' consider and approve ' the budget of the Organization. It manifestly is not permissible to abdicate, or to transfer to others, this essentially legislative function with which it has been so carefully invested.

" What then do we understand to be the real meaning and effect of Article 9 of the Statute? Must the Assembly honor judgments without question or does it have a right to question them ?

" A reasonable construction of Article 9, and one which is consonant with the Charter, is that in saying that in any case involving compensation the amount shall be fixed by the Tribunal ' and paid by the United Nations ', the Assembly was announcing a general policy to be followed by it in the ordinary course, but that it was not entering into an unqualified undertaking that in no event and under no circumstances would it withhold an appropriation. It was not saying that under no circumstances would it enquire into a judgment, or have it enquired into, even if there were apparent reasons for doing so. To summarize, we may draw these conclusions:

" *First*, that in the exercise of its budgetary authority to which we have already referred, the Assembly can scarcely fail to consider an award when it forms an item in a budget to be voted;

" *Second*, that the Assembly cannot close its eyes to an award if on its face it is open to serious question;

" *Third*, that as part of the process of considering and adopting budgets, each Member of the Assembly has an express constitutional right to vote for or against any item in the budget; and

" *Fourth*, that no Member of the Assembly may be deprived of this right.

" It has been generally admitted that the Assembly has the ' power ' to withhold appropriations, and an effort has been made to draw a distinction between the exercise of a ' power ' and the exercise of a ' right '. And it has been said that in the situation here presented there is no legal right to decline to appropriate. This conclusion is wholly lacking in legal justification. It amounts to saying that the exercise of a constitutional right is not the exercise of a legal right. In declining to appropriate funds to effectuate an award the Assembly would not be exercising sheer power. It would be exercising not only ' power ' but an incontestable ' legal right ' conferred by the Charter, a right which, in my judgment, it has in no sense surrendered.

" It follows that the provision in the Statute that awards of the Tribunal shall be paid by the United Nations does not deprive the Assembly of its right, when a question has been raised, to examine the award or to cause it to be examined. The decision is not *res judicata* in the sense that the Assembly is precluded from exercising its powers under the Charter. Even if we assume that the Assembly could surrender its prerogatives in this respect, we cannot assume that it has done so by innuendo.

" In support of the proposition that decisions of the Tribunal create a legal liability for the Organization which it is not free to ignore, reference has been made to Section 21 of the Headquarters Agreement between the United Nations and the United States of America of June 26, 1947, wherein provision is made for submitting to an arbitral tribunal for ' final decision ', any dispute concerning the interpretation or application of the Agreement. It is reasoned that a decision by the arbitral tribunal would be binding on the United Nations Organization and not merely on the Secretary-General, and that the General Assembly would have no legal right to repudiate the award (11, U.N. Treaty Series (1947), 12, 30).

" This conclusion is not open to question. But it can hardly be said that a decision of the Administrative Tribunal is, from the point of view of its binding force, analogous to a decision of an arbitral tribunal under the Headquarters Agreement. The two situations are entirely different.

" Section 21 of the Headquarters Agreement relates to disputes between the United Nations on the one hand and the United States of America on the other hand, and not to disputes between the United States and the Secretary-General. It provides that three arbitrators shall be chosen, one by the Secretary-General, one by the Secretary of State of the United States, and the third by agreement of the two, or, in the event of their failure to agree, by the President of this Court. Then follows a provision for a request by the General Assembly for an Advisory Opinion, after which the arbitral tribunal shall render a final decision.

" It is to be observed:

" *First*, that the Headquarters Agreement is an agreement between the United Nations and a Member State;

" *Second*, that the disputes there envisioned are disputes between the United Nations and the Member State;

" *Third*, that in such a situation the Secretary-General acts merely in a nominal capacity as agent for the United Nations;

" *Fourth*, that the Headquarters Agreement was concluded pursuant to the Convention on Privileges and Immunities, approved by the General Assembly on February 13, 1946. This Convention specifically conferred upon the United Nations, capacity (*a*) to contract, (*b*) to acquire and dispose of property, (*c*) to institute legal proceedings, and (*d*) to make provision for appropriate modes of settlement of ' disputes arising out of contracts ', etc. (1, U.N. Treaty Series (1946–1947), Art. VIII, Sect. 29, pp. 17, 30); and

" *Fifth*, that the Privileges and Immunities Convention provided as a condition precedent to its coming into force as regards any Member of the United Nations, the deposit by that Member with the Secretary-General of an instrument of accession. Such instruments were deposited.

" It will thus be apparent that decisions of an abitral tribunal under the Headquarters Agreement occupy a status quite different from decisions of an Administrative Tribunal created by the General Assembly.

" In the *first* place, decisions by the arbitral tribunal under the Headquarters Agreement have back of them an international convention.

" In the *second* place, the disputes are disputes between the United Nations and a Member State, under an Agreement made pursuant to a Convention.

" Whereas in the case of the Administrative Tribunal,

" (*a*) it was not created pursuant to an international convention, but pursuant to authority of the General Assembly under the Charter to create subsidiary organs, and

" (*b*) the disputes coming before the Tribunal are not disputes between the United Nations and a staff member, but between the Secretary-General and a staff member.

" It must therefore be obvious that from the point of view of the finality of decisions and the establishment of a legal liability of the United Nations, there is no analogy between the two situations.

" What has just been said regarding the Headquarters Agreement applies with equal force to arbitration under the Agreement of July 1, 1946, between the United Nations and the Swiss Confederation concerning certain properties in the ' Town of Geneva ' (1, U.N. Treaty Series (1946–1947), 155).

" Finally, it has been said that a decision of the Administrative Tribunal is a decision of a judicial organ and that the General Assembly is not empowered by the Charter to exercise judicial functions, and hence cannot review such a decision.

" This would seem to be confusing two quite distinct procedural processes, i.e. that of review in the political or administrative sense, and that of review in the judicial sense. It is hardly to be expected that the Assembly would convert itself into a court of law exercising appellate jurisdiction in such cases. The notion of an appellant and a respondent is wholly excluded. The Assembly would be acting as a political body having responsibility for the proper functioning of one of its subordinate organs. It is not for the Court to say in what manner the power of review should be exercised. It is sufficient to say that the authority to review exists, and that it is for the Assembly to decide how best it may be exercised.

" The only question before the Court is the abstract question of the right of the Assembly to decline ' on any grounds ' to give effect to an award of compensation. To this question I find no difficulty in giving an affirmative answer.

" This brings me to the second question presented, namely, what are the ' principal grounds upon which the General Assembly could lawfully exercise such right '.

" It is not to be supposed that the Assembly would desire to act on frivolous grounds, nor is it to be supposed that it would desire to act arbitrarily. This would not be in keeping with its purposes in creating the Administrative Tribunal. There must, in the nature of things, be an intermediate position between arbitrary action by the Assembly and compulsory action by it—a position which will safeguard the staff members vis-à-vis the Secretary-General and at the same time safeguard the Assembly and the United Nations.

" We may take as our premise that in creating the Tribunal the Assembly had in mind (*a*) the protection of the contractual rights of members of the staff against faulty or arbitrary acts of the Secretary-General; (*b*) that it also had in mind protection of the Secretary-General against unreasonable and vexatious demands by members of the staff; and (*c*) that, in short, and in a broad sense, it had in mind the maintenance within the Secretariat of a proper *esprit de corps*.

" An obvious departure by the Tribunal from these broad purposes, such as by denying relief where relief is warranted, or by granting a greater measure of relief than is warranted by the facts and the applicable Rules and Regulations would constitute a deficiency in the administrative process. The extent of the deficiency would be a major consideration in any given case, since no one can expect of any tribunal an unfaltering degree of perfection.

" As part of this general picture it is appropriate to observe that there is a presumption that decisions of courts of law, especially courts of last resort, are just and proper. But this is a rebuttable presumption. It is common knowledge that justice is not always administered and hence there may be a resulting denial of justice.

" Denial of justice is a term well recognized in international law. It constitutes a sound basis for establishing State responsibility in the field of international reclamations. It serves as the justification for questioning and enquiring into decisions of national courts of last resort.

The term has been variously defined and given varying shades of meaning by international tribunals, depending upon the nature of the cases before them. Examples of expressions used are: manifest injustice, an obvious error in the administration of justice, a clear and notorious injustice, fraud, corruption or wilful injustice, bad faith, a manifestly unjust judgment, a judgment that is arbitrary or capricious, a decision that amounts to an outrage, etc., etc.

" I am not suggesting that judgments of the Administrative Tribunal might fall within any one of these categories. I am not here discussing any particular case or any group of cases. Such a discussion is not envisaged by the questions submitted to the Court.

" The Court is asked to consider only the abstract question of *right* to decline to make an appropriation to satisfy an award. To this I have answered that there is no justification for concluding that the General Assembly is bound to effectuate a decision which is not juridically sound, and which, because of the absence of juridical plausibility, does not command the respect of the Assembly. A proper administration of justice within the Secretariat must be the guiding criterion. A denial of justice in the sense of the prevailing jurisprudence on the subject should find no place in the United Nations Organization.

" If I am correct in my conclusion stated above, that the Assembly has a right to review a decision of the Tribunal, as a corollary to its duty to ' consider and approve the budget of the Organization ' and to maintain a high standard of efficiency and integrity, it must follow that it may ' lawfully ' exercise that right with respect to any decision which does not commend itself to respectful and favorable consideration.

" The *principal* grounds upon which the Assembly may lawfully exercise a right to decline to give effect to an award may be simply stated as follows:

" (1) That the award is *ultra vires;*

" (2) That the award reveals manifest defects or deficiency in the administration of justice;

" (3) That the award does not reflect a faithful application of the Charter, the Statute of the Tribunal, or the Staff Rules and Regulations, to the facts of the case; and

" (4) That the amount of the award is obviously either excessive or inadequate."

In his Dissenting Opinion Judge Levi Carneiro said:

" Having, to my regret, given an answer different from that of the Court to the questions submitted to it, I must set out very briefly the grounds for my opinion.

" In order to resolve these questions, it seems to me that the system of the United Nations regarded as a whole is of more importance than the literal meaning of a few words taken from the Statute and the Regulations. Indeed, even with regard to literal interpretation, this Court has already affirmed a principle laid down by the Permanent Court of International Justice:
'. . . words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd ' (*Competence of the General Assembly for the Admission of a State to the United Nations.* I.C.J. Reports 1950, p. 8).

" I. The United Nations Organization is based on ' the principle of the sovereign equality of all its Members ' (Charter, Article 2 (1)), and the General Assembly is its only organ established by the Charter which is made up of representatives of all Member States.

" (*a*) The General Assembly is the first of the six ' principal organs ' mentioned in Article 7 of the Charter.

" (*b*) The General Assembly dominates the whole Organization, decisively intervening in the formation of the other principal organs, with a considerable control, varying in degree, over their activities and exercising an ever-widening influence in relation to the aims of the United Nations.

" (*c*) The Assembly cannot surrender its prerogatives, nor can it irrevocably delegate them. This principle was recognized when the ' Little Assembly ' or ' Interim Committee ' was set up. The Assembly, moreover, possesses certain implied powers (Charter, Article 11 (4)).

" (*d*) In order to lighten its burden, the Assembly can merely ' establish such subsidiary organs as it deems necessary for the performance of its functions ' (Charter, Article 22). The meaning of the word ' subsidiary ' is ' anything which is of assistance to something which is of a principal order ' (' subsidiaire: qui vient en aide à quelque chose de principal '—Littré, *Dictionnaire*). The functions assigned to the subsidiary organ always remain functions of the Assembly.

" (*e*) In respect of the staff of the Secretariat, the Assembly ' establishes ' the Regulations under which this staff is appointed by the Secretary-General (Charter, Article 101). Consequently, it also regulates the conditions in which these officials must leave. It supervises the application of these Regulations.

" II. The ' Administrative Tribunal ' was given its name in the days of the League of Nations, possibly as a result of the influence of Albert Thomas, who was himself inspired by the terminology of French public law.

" (*a*) ' Administrative Tribunals '—whatever may be the binding force of their decisions—are not, and never have been, regarded in France as judicial organs: they are administrative organs (Laferrière, *Contentieux administratif*, Vol. 1, p. 619; Louis Renault, *Précis de droit administratif*, pp. 38–40).

" (*b*) The United Nations Administrative Tribunal was established by the General Assembly in accordance with the principles referred to above (I, *c*, *d* and *e*), and belongs to the system of the Organization.

" (*c*) The terminology of the Statute does not justify the view that the United Nations Administrative Tribunal is a true and entirely independent judicial organ. The appellation ' tribunal ' has been applied to other organs of the United Nations which are not judicial bodies—' the Tribunal for Libya ', ' the Tribunal for Eritrea '. When it is said that the ' judgments ' of the Tribunal shall be ' final and without appeal ' (Statute, Article 10 (2)), the reference is merely to the procedure to be followed; it did not prevent the Tribunal, in special circumstances, from reviewing its own previous decision, and it is not sufficient to prevent the General Assembly from refusing to give an effect to an award of compensation made by the Administrative Tribunal, an organ which is subsidiary in relation to it. The Statute provides that the Administrative Tribunal may ' order the rescinding of the decision or the specific performance of the obligation ', but at the same time it permits the Secretary-General to refuse to give effect to the decision, compensation being in that event awarded to the official. The decisions of *Conseils de préfecture*, which are likewise administrative tribunals, are referred to as ' judgments ' in recent French legislation. The provisions (Statute, Articles 9 (3) and 12), in accordance with which the compensation fixed by the Tribunal is to be paid by the United Nations or by a specialized agency, merely indicate by whom the compensation is to be paid, but they do not imply an unconditional obligation to make immediate and complete payment. Any other interpretation of these words would lead to ' *something unreasonable or absurd* '.

" (*d*) Moreover, there is no requirement that members of the Administrative Tribunal should have any specialized training or, in particular, any legal qualification; they are not called ' judges ', they do not enjoy salaries which cannot be reduced, for the General Assembly can in fact fix and alter these salaries at its pleasure; they are elected by the General Assembly for the short term of three years. A member of the Tribunal can be dismissed by the Assembly if ' the other members are of the unanimous opinion that he is unsuited for further service ' (Statute, Article 3 (5)). Decisions are taken by three members of the Tribunal—less than half of its total membership—and the majority may consist of only two votes.

" (*e*) When it established the Administrative Tribunal in 1949, the General Assembly of the United Nations could not have forgotten what had happened in 1946 with regard to certain decisions of the Administrative Tribunal of the League of Nations. Nothing was, however, done to prevent a further refusal by the General Assembly to give effect to a decision of the Tribunal: the provisions of the former Statute were retained; indeed, the word ' member ' was adopted to designate those who in the earlier Statute had been referred to as ' judges '.

" (*f*) The General Assembly could only establish a subsidiary organ which was not a true judicial tribunal, for the General Assembly itself has no judicial functions for the reasons mentioned below (II *h*).

" (*g*) Even for the purpose of governing the external relations of the Organization—that is, with regard to questions arising with a State or with third parties—in the Conventions of February 13th, 1946, June 11th, 1946, July 1st, 1946, and June 26th, 1947, the United Nations merely provided for arbitral bodies which were not to be organs of the United Nations and whose decisions were to be subject to an Advisory Opinion of the International Court of Justice, or whose third arbitrator was to be appointed by the President of the International Court of Justice.

" (*h*) For the purpose of governing the internal relations of the Organization—such as disputes between officials of the Secretariat and the Secretary-General—if the Assembly had established a judicial organ, that organ would inevitably be directly subordinated to the International Court of Justice, which is the ' principal judicial organ of the United Nations ' (Charter, Article 92). The decisions of the Administrative Tribunal of the International Labour Organisation are, by virtue of an express provision of its Statute, subject in certain cases to an Advisory Opinion of the International Court of Justice which is binding.

" (*i*) The General Assembly is not a party to disputes decided by the Administrative Tribunal; it is only the Secretary-General who is the defendant. He is not referred to in terms—at least in the cases which I have seen—as the representative of the United Nations (see III, *e*).

" (*j*) The decisions of an ' administrative tribunal ' thus constituted and functioning in this way (II, *d*) cannot have the weight of *res judicata* (see Georges Scelle, *Manuel de droit international public*, 1948, p. 665).

" (*k*) The ' United Nations Administrative Tribunal ' is not independent; not is it a judicial organ; it merely exercises ' quasi judicial ' functions. The General Assembly likewise exercises functions of this sort (Kelsen, *The Law of the United Nations*, p. 194).

" III. The relationship between the Administrative Tribunal and the General Assembly, of which it is a ' subsidiary organ ', is clearly indicated by the powers of the General Assembly, and the conditions in which that body functions, which have been referred to above. The General Assembly may, as it has already done, modify the jurisdiction of the Tribunal, or it may abolish it. A number of rules which have already been adopted have limited the action of the Tribunal and the scope of its decisions.

" (*a*) Changes of rules governing judicial organization and judicial procedure—even when truly and completely judicial—are applicable to earlier cases.

" (*b*) The officials of the United Nations are bound by a ' public law contract '. In such a case, ' a convention, whatever its provisions may be, cannot have the legal effect of limiting the competence of the Administration[1] ' (Jèze, *Principes généraux de droit administratif*, 1926 ed., Vol. III, p. 430).

" (*c*) The Assembly is technically able—and under a duty—to control the action of the Administrative Tribunal, an organ which it has established to assist it in the performance of its functions. Although without judicial competence *stricto sensu*, it can, in respect of legal questions raised by decisions of the Administrative Tribunal, call upon the collaboration of its Sixth Committee (Legal Committee), of the International Law Commission and—as it has done in the present case—of the International Court of Justice.

" (*d*) The decisions of the Administrative Tribunal are decisions of first instance: as a rule, the dispute must first be submitted to the Joint Appeals Body; this is, however, merely an advisory body and its opinion may be dispensed with, it then being possible to submit the application directly to the Administrative Tribunal (Statute of the Administrative Tribunal, Art. 7).

" (*e*) Decisions of the Administrative Tribunal, if not subject to control by the General Assembly, would have greater binding force than the judgments of the International Court of Justice itself: the General Assembly would have to give effect to them without question. The Tribunal could at its pleasure define the limits of the disciplinary powers of the Secretary-General, could interpret, apply or refuse to apply rules adopted by the General Assembly. The decisions of this ' subsidiary organ ' would be binding upon two ' principal organs '—the General

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[1] Translation by the Registry.

Assembly and the Secretary-General—even on matters within their own competence.

" IV. In the present case, in accordance with the terms of the request for advisory opinion, what is in fact involved is the General Assembly's refusal to give effect to an award of compensation made by the Administrative Tribunal in favour of a dismissed official. The exercise of the Assembly's budgetary power is thus involved.

" (*a*) It is for the General Assembly alone to approve the budget of the Organization (Charter, Art. 17 (1)). ' Budgetary questions ' are ' important ' and must be decided ' by a two-thirds majority of the members present and voting ' (Charter, Art. 18 (2)).

" (*b*) Every increase in the expenditure of the Organization necessarily involves an increase of the contributions by Member States and must consequently affect the national budget of each of these States.

" (*c*) I cannot conceive that the General Assembly can be obliged automatically to give effect to decisions—and to lay upon Member States the ensuing financial burden—which may have been taken by only two members of one of its subsidiary organs, the Administrative Tribunal.

" (*d*) The General Assembly ' must ' respect a legal obligation of the United Nations which has duly arisen or been validly recognized; but a decision of the Administrative Tribunal does not give rise to or amount to final recognition of an obligation of the United Nations.

" (*e*) Payment of compensation awarded by the Administrative Tribunal may be made—as has been done in almost all cases—by the Secretary-General when there are funds provided by the budget which he may use for this purpose; this he can do without any examination of the matter by the General Assembly, where the General Assembly itself has expressly or impliedly authorized such a course. In other cases, the General Assembly may refuse payment entirely or may allow only a part of the award, if it considers the decision of the Administrative Tribunal to have been ill-founded.

" V. The rights, and indeed the interests, of officials must be guaranteed and respected. But in truth these rights and interests will not be any less guaranteed and respected by the deliberations of the direct representatives of the sixty Member States than by the Administrative Tribunal as at present organized. This is particularly true since: (1) the very existence of the Tribunal and the scope of its decisions are dependent upon decisions of the General Assembly, and (2) the General Assembly must always respect the presumption in favour of the legality and the validity of decisions of the Administrative Tribunal, thus exercising in good faith, discretion, and imbued with the spirit of justice, its prerogative of refusing to give effect, either in whole or in part, to any given decision."

D—OTHER INTERNATIONAL ORGANIZATIONS AND ORGANS OF INTERNATIONAL ADMINISTRATION

International Organizations—Reservations in Matter of Adherence to—International Refugee Organization—Membership of United States of America.

See p. 199 (*United States* v. *Rumsa*; *Rumsa* v. *Hershey et Al.*).

E—INTERNATIONAL OFFICIALS

International Organizations—International Labour Organization—Officials of—Contracts of Employment—Expiry of—Age of Retirement—Discretionary Powers of Director-General—Competence of the Tribunal.

PLISSARD *v.* INTERNATIONAL LABOUR ORGANIZATION.

Administrative Tribunal of the International Labour Organization.
September 3, 1954.

THE FACTS.—This was an appeal by a former official of the International Labour Office against the decision not to retain him in service beyond the statutory retirement age. Article 50 of the Staff Regulations of the I.L.O. provides that an official shall retire upon reaching his sixtieth birthday. It is further provided that in special cases the Director-General may retain an official in service until he reaches his sixty-fifth birthday. The complainant requested the extension of his appointment beyond the statutory retirement age on the grounds that, owing to an interruption in his period of service resulting from emergency measures taken to meet the exigencies of the situation created by the Second World War, the termination of his appointment would involve severe hardship for him. This request was not granted, and the complainant sought the cancellation of the decision not to extend his appointment beyond the retirement age. It was contended on behalf of the Director-General that the complaint failed to state a cause of action of non-observance in substance or in form of the terms of appointment of the complainant or of the applicable provisions of the Staff Regulations.

Held: that the decision of the Director-General should be upheld. The Director-General enjoyed discretionary powers to decide in which cases an exception might be made to the rule that officials retire upon reaching their sixtieth birthday, and his judgment in this respect was final and was not subject in law to any rule which had not been observed. The Tribunal was not competent to judge the merits of the decision reached by the Director-General in the exercise of the powers conferred on him by the Staff Regulations.

[Report: International Labour Office, *Official Bulletin*, Vol. XXXVII, No. 7, p. 271.]

International Organizations—Officials of—Conduct Damaging to the Good Repute of the Organization—Appearance before National Judicial Authority—Refusal to Appear—Powers of Director-General to Order Appearance.

LEFF *v.* UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION.

Administrative Tribunal of the International Labour Organization. September 6, 1954.

THE FACTS.—On May 15, 1953, the complainant, a United States national and an official of the United Nations Educational, Scientific and Cultural Organization (UNESCO), was served with a subpoena to appear before a United States Federal Grand Jury on May 21, 1953, to testify and give evidence concerning a possible offence under Section 371, Title 18, V supplement, U.S. Code, relating to " conspiracy to commit offence or to defraud the United States ". The complainant did not comply with the subpoena. The Acting Director-General of UNESCO was informed that the competent authorities had refused to consider as legitimate the complainant's refusal to appear before the Grand Jury. On May 22, 1953, the Acting Director-General of UNESCO informed the complainant of his decision to proceed to an investigation into the circumstances of the summons and the validity of the grounds on which the complainant refused to appear before the Grand Jury. At the same time, the Acting Director-General, relying on Article 92 (e) of the UNESCO Rules, suspended the complainant, with pay, on the ground that his refusal to comply with the summons constituted *prima facie* evidence of conduct incompatible with his obligations as an official of UNESCO, as laid down in the Staff Regulations. On May 27, 1953, the complainant appealed against this decision before the UNESCO internal Appeals Board, and sought both the rescission of the decision to suspend him and the abandonment of the proposed investigation. On July 27, 1953, the internal Appeals Board recommended that the suspension be rescinded, that the complainant be reinstated in his functions but that the complainant was not justified in asking that the investigation be abandoned. On July 29, 1953, the Director-General of UNESCO instructed the complainant to report for duty on July 30, thus cancelling the decision to suspend the complainant. However, on July 30, when the complainant reported for duty, the Director-General orally proposed to the complainant that in the event of his proceeding to New York to appear before the Federal Grand Jury and being unable, as he feared, to return to the Paris Headquarters of UNESCO, since the passports of the complainant, his wife and his two children had been withdrawn by the Consulate of the United States in Paris on August 17, 1951, the complainant should be transferred with his post to the New York Office of

UNESCO, and that the travel expenses of his family and the transport of his possessions to New York be paid by UNESCO. The complainant replied in writing, on August 3, 1953, that before considering the Director-General's proposal, he wished to exercise his right as a citizen of the United States to ask to be questioned by or on behalf of the Federal Grand Jury in Paris, and asked to be allowed the time required for the purpose. On September 24, 1953, the Director-General was informed by the Embassy of the United States in Paris that, with reference to the complainant's request that his testimony be taken in Paris, the Federal Grand Jury considered that the subpoena served on the complainant to appear in New York was still in effect, and that the Grand Jury did not intend to respond to the complainant's request to be heard in Paris. This communication was immediately brought to the attention of the complainant who, on October 22, 1953, informed the Director-General, in writing, that his negotiations had failed, and requested UNESCO to undertake official negotiations to secure that his testimony be heard in Paris. On November 18, 1953, the Director-General refused to undertake official negotiations for the purpose as it was for the competent judicial authorities to decide on the procedure to be followed. On December 3, 1953, the Director-General informed the complainant that, having received no reply to his offer of transfer, he *instructed* him to proceed to New York to respond to the subpoena of the Federal Grand Jury. In his letter, the Director-General stated that he was not satisfied that any of the complainant's rights would be jeopardized by the complainant's compliance with the subpoena or by his acceptance of the offer to transfer him, and his post, to the New York Office of UNESCO. The instruction to proceed to New York was reiterated in a letter of December 11, 1953, in which the Director-General invited the complainant to make the necessary travel arrangements to proceed to New York before December 17, 1953 and stressed that the complainant's " refusal to respond to the subpoena addressed to [him] by the judicial authorities of [his] country was a serious matter which could gravely damage the prestige and reputation " of UNESCO. The Director-General added that on December 3, 1953, he instructed the complainant to go to New York to respond to the Federal Grand Jury's summons in order that prejudice might not be caused to UNESCO, which he had undertaken to serve with its interests alone in view. The offer to transfer the complainant to New York in the event of his being unable to return to Paris afforded a satisfactory guarantee against his fear regarding continuation of his employment and separation from his family. The Director-General also emphasised that this offer was conditional, and did not constitute a direction for the compulsory transfer of the complainant to New York. The complainant informed the Director-General, on December 14, 1953, that he intended to lodge an appeal before the Appeals Board against the Director-General's instruction to proceed to New York for the purpose of appearing before the Grand Jury. On December 17, 1953, the Director-General informed the complainant that, in view of the exceptional nature of the affair, he had decided to rescind that part of his letter of December 11, 1953 which required the complainant to make, by December 17, 1953, arrangements for his departure. The Director-General added that he would inform the complainant later of the date by which he required him to make such arrangements. On December 28, 1953, the complainant requested the Appeals Board to rule that the order given to him to go to New York for the purpose of testifying before the Grand Jury " could not be validly given under the regulations and rules in force, that it enjoined an international official to perform an act foreign to the service and that in consequence it must be withdrawn ". On March 8, 1954, the Appeals Board expressed the opinion " that the decision dated 3 and 11 December 1953 should be rescinded in so far as it orders Mr. Leff to go to New York to comply with the summons to appear before the Grand Jury ". The Board added that it might have come to a different conclusion if a writ of summons had been issued instead of a subpoena. On March 16, 1954, the Director-General informed the complainant that, by a letter dated March 13, 1954, he had been informed by the Permanent Delegate of the United States to UNESCO that the United States District Court for the Southern District of New York had issued, on March 11, 1954, an order enjoining the complainant to show cause, on March 25, 1954, why he should not be adjudged for criminal contempt of court for having refused to appear before the Grand Jury pursuant to a subpoena. On March 16, 1954, the complainant received by registered post a copy of the order to show cause and asked the head of the Bureau of Personnel and Management of UNESCO whether such an order could be properly served on the headquarters territory of UNESCO. On the same day the head of the Bureau of Personnel and Management stated, on behalf of the Director-General, that the premises of UNESCO being inviolable, no service of legal process might take place thereon except with the consent of, and under conditions approved by, the Director-General, which consent had been neither requested nor given. On March 22, 1954, the Director-General informed the complainant that he had been officially informed of the issue of an order to show cause by the United States District Court for the Southern District of New York and instructed the complainant to satisfy the requirements of the judicial authorities of the United States. The Director-General further emphasised the importance he attached to the judgment to be rendered by the District Court. On March 27, 1954, the Director-General was informed by the Permanent Delegate of the United States to UNESCO that the District Court had found the complainant in contempt of court and had issued a bench warrant against him. On April 6, 1954, a notice of cross motion filed with the United States District Court for the Southern District of New York made known that the complainant moved that the subpoena, bench warrant and order to show cause be quashed upon the ground that a Grand Jury subpoena could not be served outside the territory of the United States, that the respondent was never served with process and that the court was without jurisdiction over his person. On April 15, 1954, the Director-General informed the chairman of the Appeals Board whose recommendation of March 8, 1954 had not yet been acted upon, that the judicial authorities of the United States had issued the order to show cause to which the Appeals Board had formally referred in its opinion of 8 March 1954 and in the absence of which the Appeals Board had considered that it was not for the Director-General to order the complainant to go to New York. The Director-General added that in view of this new fact, " he reserved the right to take, in the light of the judgment to be adopted by the United States District Court, any decision concerning the complainant which he might deem necessary ". However, on March 24, 1954, the complainant had filed a complaint with the Tribunal asking that " the Tribunal be pleased to judge that the order given by the Director-General of UNESCO to Mr. David Leff on 3 and 11 December 1953 and on 22 March 1954 cannot be validly given under the regulations and rules in force, that it enjoins an international official to perform an act foreign to the service and to his obligations, and that in consequence it must be rescinded ". On the other hand, it was contended, on behalf of the Director-General, that the order of December 3 and 11, 1953, to appear before the Grand Jury had been suspended and later superseded by the order of March 22, 1954, to satisfy the requirements of the judicial authorities of the United States in the show cause procedure. The latter had not been appealed against, and the complaint was not receivable. Consequently, the Tribunal was not competent to consider the validity of the Director-General's action.

Held: that the complaint must be rejected so far as it related to the order of March 22, 1954. The Director-General's order to the complainant to answer to a Federal Grand Jury subpoena was not valid and must be rescinded. No appeal had been lodged against the Director-General's order to the complainant to answer to a District Court order to show cause. The two orders must be distinguished.

The Tribunal said: " The first question which arises is to know whether the order given by the Director-General to the complainant on 22 March 1954—by which the Director-General instructed him to satisfy the requirements of the judicial authorities of the United States as formulated at that date in consequence of the issue of the order to show cause—forms an indivisible whole with that of 3 December 1953 (repeated on 11 December 1953) concerning the summons before the Grand Jury of which the first is but the consequence; . . . the order of 3 December 1953 (repeated on 11 December 1953) was partly rescinded on 17 December only in so far as it fixed the maximum time limit for its execution, the order itself being unquestionably maintained in principle.

" . . . It is impossible to admit that there is unity between the two orders. The order of December 1953 was based on the demand for the personal appearance of the complainant before the Grand Jury to give testimony whilst that of 22 March 1954 was based on the duty of the complainant to defend himself before the court seized of an indictment against him; whereas the purpose of the order of December 1953 was to oblige the complainant to go to New York, the order of 22 March 1954 required him to satisfy the requirements of the judicial authorities of the United States as formulated at that date, which included the possibility, for the complainant, to arrange for himself to be represented . . . The two orders have thus a different basis (subpoena before the Grand Jury on the one hand and, on the other hand, writ of summons before the court) and a different purpose (personal appearance in the first case and freedom to be represented in the second case, at the time of formulation of the order). At the time when the first order was given the complainant had not yet become involved as an accused person, as was the case when the order of 22 March 1954 was given. It was thus that the Appeals Board, on 8 March 1954, considered that the Director-General was not, on the basis of the facts existing at that date, justified in giving this order. . . . Therefore, . . . the two orders must be considered as distinct and subjected to separate examination through separate procedures."

" The defendant Organisation contends that the order [to appear before a Federal Grand Jury] has been replaced and completely rescinded by the subsequent order of 22 March 1954. Nevertheless, . . . in fact the order of December 1953 has never been explicitly withdrawn as regards the part subsisting after the notification dated 17 December of the same year and . . . besides, this order has in no way become non-executable as long as it is not established that the procedure before the Grand Jury which gave rise to the issue of the subpoena has finally been dropped. . . . The statements subsequently made by the defendant Organisation as to the total rescission of the order are devoid of relevance, as the situation must be determined at the time when the Appeals Board issued its opinion, whereas the Organisation participated in the meetings of the Appeals Board to defend there the measures impugned and against the claim of the complainant.

" . . . It is thus the duty of the Tribunal to examine the validity of this order. . . . The order obviously does not concern the actual service of the international Organisation; . . . the latter must enjoy the full sovereignty of its authority and must not be to any extent subject to external influence emanating from any one of its States Members; in this respect most strict and clear provisions guarantee its complete independence and that of its officials.

" Article VI, paragraph 5, of the Constitution of UNESCO specifies the following:

> ' The responsibilities of the Director-General and of the staff shall be exclusively international in character. In the discharge of their duties they shall not seek or receive instructions from any Government or from any authority external to the Organization. They shall refrain from any action which might prejudice their position as international officials. Each State member of the Organisation undertakes to respect the international character of the responsibilities of the Director-General and the staff, and not to seek to influence them in the discharge of their duties.'

It is specified in UNESCO Staff Regulation 1.2 that the members of the staff are responsible to the Director General ' in the exercise of their functions '; . . . besides, . . . Staff Regulations 1.4 provides that members of the Secretariat shall conduct themselves at all times in a manner consonant with the good repute and high purpose of the Organisation and their status as international civil servants; they shall not engage in any activity that is incompatible with the proper discharge of their duties; they shall avoid any action, and in particular any kind of public pronouncement which would adversely reflect upon their position as international officials; while they are not expected to give up their religious or political convictions or national sentiments, they shall at all times exercise the reserve and tact incumbent upon them by reason of their international responsibilities; Staff Regulation 1.9 provides that on accepting appointment each staff member shall subscribe to a declaration whereby he undertakes to exercise the functions entrusted to him with the interests of the Organisation only in view.

" It does not follow from the above-mentioned texts that the conduct of an official with regard to the Government of his country, although outside the actual service of the international Organisation, is entirely outside the control of the disciplinary authority of the Organisation. On the contrary that is the case when that conduct is judged to be seriously likely to affect the dignity of the official and the prestige of the organisation to which he belongs—a point of fact of which the appreciation will vary according to the circumstances of each case.

" . . . The validity of the order in dispute therefore depends entirely on whether, if on 3 and 11 December 1953, this fact was established to the point that the intervention of the authority of the Director-General was justified. The Appeals Board formally expressed the view that at that date disciplinary action was not justified, the circumstances required for such action not being met since there was only a question, in the case of the complainant, of abstention from appearing in New York as a witness in the investigation of the Grand Jury. The opinion thus expressed by the Appeals Board should be subscribed to and . . . in consequence the order of 3 and 11 December 1953 should be rescinded; . . ."

No specific internal appeal against the Director-General's order to the complainant to satisfy the District Court order to show cause in a contempt of court action had been lodged; the Tribunal was therefore not competent to pass on its validity, and the complainant should be allowed to challenge the validity of the order before the internal Appeals Board.

The Tribunal said: " As regards the said order, the Tribunal can only note that it has not thus far been the subject of an appeal before the Appeals Board. . . . Article VII of the Statute of the Tribunal provides that a complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable staff regulations.

" In fact . . . the time limit provided for in Article 10 of the Provisional Rules of the Appeal Board for filing an appeal against the order in question has now expired; but if no appeal was made, this is obviously because, in the view of the complainant, no distinction was to be made between the order of 3 and 11 December 1953 and the order of 22 March 1954. It is therefore in the strict interests of impartial justice that the time limit for appeal be reopened as from the date of the present judgment so that the complainant may exercise his right freely and completely before the Appeals Board to challenge the validity of the order under dispute, particularly in setting forth all the considerations relating to the circumstances under which the penal procedure taken against him was opened and followed, taking into account the nature of the indictment to which he has to reply.

" The Tribunal . . . declares the complaint at present irreceivable in so far as it relates to the order of 22 March 1954 ; . . ."

[Report: International Labour Office, *Official Bulletin*, Vol. XXXVII, No. 7, p. 285.]

NOTE.—With respect to the appearance of United States citizens employed by the United Nations and by the specialized agencies, as witnesses before United States Federal Grand Jury and Congressional Committees, and the investigation of the loyalty of such officials by United States Government agencies, see *International Law Reports*, 1953, p. 505, Notes (1) and (2).

International Organizations—Officials—Dismissal of—Reasons for Dismissal—Reliance on Unsatisfactory Service—Exercise of Discretionary Powers—Diplomatic Communications—Secret Documents—Substitution of Reasons—Misuse of Power.

McINTIRE *v.* FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS.

Administrative Tribunal of the International Labour Organization. September 3, 1954.

THE FACTS.—The complainant was originally granted a five-year appointment with the defendant Organization which was subsequently converted into a permanent contract, subject to a probationary period commencing on the date of the original appointment. The services of the complainant gave rise from the beginning to serious doubts on the part of his superiors as to his fitness for the duties entrusted to him, although his goodwill, good intentions and devotion to duty were not called in question. The complainant's immediate superior made him aware of his shortcomings and endeavoured to help him to improve his work and confirmed in writing the oral remarks he had made when a report on the complainant's first six months of service was established. The complainant endeavoured to improve his work and his immediate superior considered that the complainant's efforts had been fruitful and deserved encouragement. The complainant's immediate superior then acceded to his request that he be allowed to use the title of " chief of section ", which involved no change in his administrative position but had, in the complainant's eyes, prestige value. This decision was brought to the attention of the Director of Administration, to whom the complainant's immediate superior was in turn responsible. No objection was raised, and the title was used within the Organization. A few days later, the Director of Administration informed the complainant that his appointment would not be confirmed on the expiry of the one-year probationary period. The notice of termination stated that both his immediate superior and the Director of Administration had had doubts about the complainant's suitability for the post he occupied, and that although there had been some improvement in his work in the previous two or three months, the Director of Administration was convinced that the complainant's abilities did not lie in the field of work in which he was engaged. The notice referred to the Administrative Rules providing that an official's appointment might be terminated at any time during or at the end of his probationary period if, after a fair trial, he did not perform satisfactorily the duties of the post to which he was assigned, and indicated that in the opinion of the Director of Administration, the complainant had been given a fair trial but had not performed his duties satisfactorily. Accordingly, the complainant's appointment was to be terminated on May 31, 1953, his probationary period expiring on June 4, 1953. The complainant appealed against this decision to the internal Appeals Board of the Organization, claiming (i) that established procedures had not been followed in giving him notice of termination of employment, and (ii) that the charge of unsatisfactory services was based on misunderstanding, prejudice or some extraneous factor. When he was heard by the Appeals Committee, the complainant abandoned his first contention and amended the second, alleging instead that the decision was based on some extraneous factor unconnected with the performance of his duties. The Appeals Committee found that there was not sufficient evidence of a justifiable grievance and added that the Staff Regulations gave the Director-General full freedom to take any factors into consideration when deciding to terminate the appointment of an official serving a probationary period, and that the Director-General's sole judgment should prevail as to whether such termination was in the interests of the Organization. Until the internal appeals procedure was initiated, the defendant had not relied on this provision to justify its decision. Immediately after the Appeals Committee concluded its proceedings, the Director-General, in an undated letter to the complainant, accepted the conclusions of the Appeals Committee and confirmed that the appointment was terminated with effect from June 4, 1953. The complainant, who was a citizen of the United States of America, contended that the termination of his appointment was unconnected with the performance of his duties—which by the defendant's own admission had improved—and was based solely on derogatory information unknown to the complainant, communicated by the United States Government to the Director-General shortly after the complainant's improved performance had earned him the right to use the title of chief of section. The defendant Organization contended that the termination of the complainant's appointment was due only to his professional shortcomings, and although it was established in the course of the oral hearings that the Director-General had in fact received at the material time information from the United States Government concerning the complainant, the defendant Organization refused to produce the letter on the grounds that it was a confidential communication from the Government of a sovereign State and that its production without the authorization of the Government concerned would constitute a violation of diplomatic usage.

Held: that the application for reinstatement must succeed. In the circumstances, the decision complained of was not based on grounds of unsatisfactory service, but on personal considerations extraneous to such grounds. Such a decision constituted an act of misuse of power and should be rescinded. Failing reinstatement, the complainant should receive fifteen months' salary, with interest, plus $3,000 by way of damages.

The discretionary powers of the Director-General regarding the termination of probationary appointments could not be exercised where a probationary appointment was terminated on the officially stated grounds of unsatisfactory service. The refusal of the defendant Organization to produce a secret document could not prejudice the interests of the complainant, but, on the other hand, the existence of a secret document concerning the complainant, the contents of which were unknown to him and against which he was powerless to defend himself, vitiated the just application of the Regulations.

The Tribunal said: " The Director of Administration, in his letter of 8 April 1953, had based his decision to terminate the appointment of [the complainant] on section 310.52 of the Administration Manual, which provides, *inter alia*, that a staff member on probation may be separated at any time during or at the end of his probationary period for unsatisfactory service, provided he receives a statement giving the specific reasons for this action; the Appeals Committee, to which the complainant appealed, believed there might be another possible justification for the measure taken against the complainant in the event of the interests of the Organisation being invoked in accordance with Article IX, paragraph 301.0912 of the Staff Regulations. The recourse to Article IX suggested by the said Committee is devoid of all relevance; it is only in the event of the Director-General having expressly invoked the said article as a basis for the decision to terminate the appointment of an official on probation that this senior official would have acted in the full exercise of his prerogative, without the Tribunal having the power to judge the reasons involving the interests of the defendant Organisation. While [the Director-General] accepted the conclusions of the Appeals Committee, he limited himself to confirming the decision [of the Director of Administration]. In addition, at that stage of the procedure, a change of grounds would have vitiated the procedure. The Administrative Tribunal of the United Nations, in its judgment No. 4, stated: ' That while it is not for the Tribunal to substitute its judgment for that of the Secretary-General with respect to the adequacy of the grounds for termination stated, it is for the Tribunal to ascertain that an affirmative finding of cause which constitutes reasonable grounds for termination has been made, and that due process has been accorded in arriving at such an affirmative finding '. The only explanation which has ever been given expressly to the complainant was based on the unsatisfactory nature of his services. The discretionary power of the Director-General in this matter cannot be exercised for reasons not clearly specified; he cannot invoke one reason for exercising his powers when in reality his action is based on another reason since this would constitute misuse of power likely to lead to rescission of the decision . . . It cannot be conceived, unless a new circumstance arose in the meantime, that [the Director of Administration] agreed, on 30 March 1953, that the complainant be authorised to use the title of chief of section whereas he himself, on 8 April of the same year, was to decide immediately to dismiss the complainant, the matter appearing so urgent to him that he could not wait for the normal end of the probationary period (which was to expire less than two months later) or for the verification of the progress noted since [the immediate chief's] report of 14 January 1953, or even hear the explanations of the complainant beforehand. The existence of this new circumstance is [proved]. It is established that between 30 March and 8 April, Mr. [Norris E.] Dodd, then Director-General, received a letter from Mr. Hickerson, Assistant Secretary of State of the United States of America, concerning the person of the complainant; the defendant Organisation has recognised that this was so since its representative declared in public sitting that the facts related in that letter were the official confirmation of information given verbally to the Director-General, Mr. Dodd, during his visit to Washington one month previously, without any steps having been taken against the complainant at that time, but also without the complainant having been informed [of the existence or nature of such information]. The complainant asked that this letter be produced [in the course of the proceedings], being of the opinion that the Tribunal would thus be in a better position to assess the influence of this document on the change of attitude of [the Director of Administration] and on the decision communicated to the complainant on 8 April. [The Tribunal then referred to the refusal of the defendant Organization to produce the letter, which refusal was in the following terms:]

> 'I have the honour to confirm the statement which I made during the sitting held this afternoon *in camera*, namely that the Director-General would have been happy to communicate this letter to the Tribunal, but that he does not consider that he should do so as this "confidential" letter comes from the Government of a sovereign State and must for that reason be treated in the same way as a diplomatic communication. Its production, without the authorisation of the Government concerned, would constitute a violation of diplomatic usage in such matters.'

[The Tribunal continued:] . . . the Tribunal, while it has not the power to express an opinion as to the merits of the reason given by the defendant Organisation, deems it is inadmissible that the considerations alleged by that Organisation can in any way prejudice the legitimate interests of the complainant. The existence of a secret document concerning the complainant, the content of which is unknown to him and against which he is consequently powerless to defend himself, obviously vitiates the just application of the Regulations to the complainant and affects not only the interests of the staff as a whole but also the interests of justice itself (*vide* judgment No. 15 of the Administrative Tribunal of the United Nations [in *Robinson* v. *Secretary-General of the United Nations:* see *International Law Reports*, 1952, p. 494]: ' The Applicant cannot be penalised because certain information is considered by the Respondent as confidential and the Applicant has no opportunity either of knowing what the reason is or of challenging it.') . . . It is the duty of the Tribunal to consider as established the fact that the decision of 8 April is not really based on the grounds of unsatisfactory service but on personal considerations extraneous to such grounds . . . it, therefore, constitutes an act of misuse of power and must be rescinded."

[Report: International Labour Office, *Official Bulletin*, Vol. XXXVII, No. 7, p. 273.]

NOTE.—With respect to the communication of information by a member State concerning an official, see *Crawford* v. *Secretary-General of the United Nations* (*International Law Reports*, 1953, p. 501). See also *Howrani et Al.* v. *Secretary-General of the United Nations* (*International Law Reports*, 1951, Case No. 142), and *Robinson* v. *Secretary-General of the United Nations* (*ibid.*, 1952, Case No. 111).

International Organizations—Officials—Dismissal of—Professional Competence.

ZIMMET *v.* SECRETARY-GENERAL OF THE UNITED NATIONS.

Administrative Tribunal of the United Nations. May 29, 1954.

THE FACTS.—This was an appeal against the decision of the Secretary-General not to renew the fixed-term appointment of the complainant, who had held in succession a number of temporary appointments (including fixed-term appointments) since he entered the service of the United Nations. The Secretary-General, as a result of the finding of the Walters Selection Committee that the complainant was " below the required standard both of intelligence and industry ", decided not to retain the complainant in service. The task of this Committee was to review the position of temporary officials of the United Nations and, having regard to their professional competence, to recommend to the Secretary-General either the grant of a permanent appointment or the termination of their appointment. Both the facts and the arguments in the present case were similar to those in the *Levinson*[1] and other cases, except that a number of administrative irregularities were found to have taken place in the examination of the complainant's position by the Walters Selection Committee. However, a full investigation of such irregularities was undertaken at the request of the Secretary-General before the latter took his final decision. Therefore, these irregularities, as well as allegations of personal prejudice on the part of the complainant's superiors, did not affect the Secretary-General's final decision.

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[1] *Levinson* v. *Secretary-General of the United Nations* (*International Law Reports*, 1953, p. 518 and Notes).

Held: that the decision to dismiss the complainant should be upheld.

The Tribunal said: " This is a case in which the Secretary-General decided not to renew a fixed-term appointment. Whatever view this Tribunal may have either of the opinion of the Secretary-General, his exercise of powers, or the decision he may reach, it is not for this Tribunal to express an opinion as to the services and value of Mr. Zimmet or the facts surrounding his previous employment; those matters would depend upon the opinion of the Secretary-General and of the administrative decision he may take. Accordingly, the Tribunal rejects the claim made. . . ."

[Report: Judgment No. 52, United Nations Document AT/DEC/52.]

NOTE.—On the non-renewal of fixed-term appointments in general, and the conditions of the exercise of the Secretary-General's discretion in respect thereof, see *Howrani et Al.* v. *Secretary-General of the United Nations* (*International Law Reports*, 1951, Case No. 142) and *Zap* v. *Secretary-General of the United Nations* (*ibid.*, 1953, p. 510).

International Organizations—Officials—Dismissal of—Termination of Permanent Appointment—Abolition of Post—Obligation to Find Alternative Post—Preservation of Rights as Permanent Official under Temporary Assignment.

AGLION *v.* SECRETARY-GENERAL OF THE UNITED NATIONS.

Administrative Tribunal of the United Nations. December 14, 1954.

THE FACTS.—The complainant entered the service of the United Nations on March 15, 1946, under a temporary appointment, on secondment from the French Government, as Director in the Economic Survey and General Division of the Department of Economic Affairs of the Secretariat. On August 15, 1946, he was granted a permanent appointment, and on December 10, 1946, he was transferred to the Executive Office of the Secretary-General as Special Adviser. In August 1947, he was orally informed of the abolition of the post he held, and on September 18 he was assigned to other work in the Executive Office of the Secretary-General, for the duration of the Second Session of the General Assembly. On October 6, 1947, the Executive Assistant to the Secretary-General informed the complainant in writing that no post of a comparable level could be found for him and that his appointment was therefore terminated. The complainant replied on October 15 that the

Assistant Secretary-General for Economic Affairs was ready to offer him a temporary post. On October 29, 1947, the Secretary-General appointed the complainant as Principal Secretary of the Special Committee on the Greek Question (established by the General Assembly to deal with the border difficulties) for the duration of the work of the Committee. The Secretary-General added that he would investigate the possibility of finding alternative employment for the complainant upon the conclusion of the Committee's work, but could not give a definite assurance of an appointment. The complainant accepted the appointment and served as Principal Secretary of the Committee. On January 29, 1952, when he still held this position, the Special Committee for the Five-Year Review of Permanent Contracts reviewed the complainant's case. In February 1952 the United Nations Special Committee on the Balkans (originally established as the Special Committee on the Greek Question) was wound up, and the complainant returned to United Nations Headquarters. On April 3, 1952, the Secretary-General decided to terminate the complainant's appointment, as from July 15, 1952, on the ground that there was no suitable alternative post for him. On May 12, 1952, the complainant wrote to the Chairman of the Board of Review of Indeterminate Contracts requesting to be informed of the Board's conclusions respecting his permanent appointment. This request was passed for reply to the Director of the Bureau of Personnel, who, on July 9, 1952, wrote to the complainant that the Special Committee for the Five-Year Review of Permanent Appointments, which had considered the complainant's case in January 1952, " after having examined the work [the complainant] had performed as Principal Secretary of the United Nations Special Committee on the Balkans . . . believed that no modification should be brought to his status of international civil servant ". Shortly before the date of termination of the complainant's permanent appointment, *i.e.*, July 15, 1952, he was offered, and accepted, a five-months' fixed-term appointment, beginning on the day after the termination of his permanent appointment, as Resident Representative of the Technical Assistance Board (generally assimilated to Chief of a Diplomatic Mission) in Haiti. This appointment was extended, on December 16, 1952, for one month, on January 16, 1954, for one year, and on July 1, 1954, for a further six months. Meanwhile, the precise status of the complainant had been under discussion. On July 28, 1952, the Assistant Secretary-General for Administrative and Financial Services, who was corresponding with the complainant in respect of a claim for rental allowance, wrote: " . . . you not only had no post at Headquarters during the period of your absence, but . . . there was no reasonable prospect that you would have a post on your return ". On September 5, 1952, the complainant replied that " . . . thus it appears that the Secretary-General's letter of 3 April, 1952, [which gave notice of termination of the complainant's permanent appointment because no suitable post could be found for him after the termination of the work of the Special Balkan Committee] cancelling my indeterminate contract, on the basis that his head of department had reported to him that there was no post for me has been based on a premise which is not correct, no investigation having been made by your department [which comprised the Bureau of Personnel, responsible for such investigations]". The complainant, while still holding a valid temporary appointment as Resident Representative in Haiti, appealed against the position respecting his status taken by the Assistant Secretary-General in charge of administrative and financial services. The internal Appeals Board, to which the case was referred, recommended, on March 31, 1952, that the " termination action of 1952 [the termination of the complainant's permanent appointment intimated by the Secretary-General on April 3, 1952] be cancelled, restoring the [complainant] to permanent contract status for the remainder of his assignment, and that during this period continuing efforts be made to find another suitable post for him in the Secretariat ". The complainant received no communication either from the Appeals Board or from the Secretary-General regarding the fate of his appeal concerning his right to continued permanent employment, as distinct from his incumbency as Resident Representative in Haiti (which was of a temporary nature) and submitted a complaint to the Tribunal, seeking the recission of the Secretary-General's decision of April 3, 1952, terminating his permanent appointment for abolition of post. The report of the Appeals Board was subsequently communicated to the complainant, who amended his original complaint and, together with additional minor claims, reaffirmed his original claim requesting the Tribunal to uphold his rights as a permanent official of the United Nations.

The main contentions of the complainant were as follows: (a) The decision of April 3, 1952, to terminate his permanent appointment violated Rule 104 of the Staff Rules in force at the material time. According to the Judgment of the Tribunal in *Aubert et Al.* v. *Secretary-General of the United Nations* (*International Law Reports*, 1951, Case No. 141), the Administration was obliged to propose to officials whose appointment was being terminated for abolition of post other posts as close as possible in content and character to that previously occupied by the officials concerned. In its judgment in *Howrani et Al.* v. *Secretary-General of the United Nations* (*International Law Reports*, 1951, Case No. 142), the Tribunal ruled, in connection with holders of temporary-indefinite appointments, that in the case of termination of the appointment of officials with service ratings of " satisfactory " or better, consideration for posts elsewhere in the Secretariat was a matter of justice and due process. In respect of officials holding permanent appointments, Staff Rule

104 required the Administration to seek a post wholly different in content from the abolished post and, if necessary, to displace officials holding temporary-indefinite appointments. The Administration was required to afford protection to the holder of a permanent appointment against fluctuation in the work of the United Nations and to ensure observance of the principle of security of tenure by seeking a post for him elsewhere in the Secretariat. Even if Staff Rule 104 were no longer in force, the complainant was entitled to the benefit of its provisions as a matter of acquired rights. (b) The guarantees formerly afforded to holders of permanent appointments in the event of abolition of post were carried over in the Staff Rules in force at the time of the appeal. Staff Rule 109.1.(b), which replaced former Staff Rule 104, stated that in the event of abolition of posts, holders of permanent appointments " shall as a general rule be retained in preference to those holding temporary appointments subject to availability of suitable posts in which their services can be effectively utilised ". (c) No attempt had been made to seek a new post for the complainant. This fact was established by the letter of July 28, 1952, from the Assistant Secretary-General in charge of administrative and financial services, which stated that " there was no reasonable prospect that [the complainant] would have a post on his return [from the Balkan Commission] ", although on April 3, 1952, the Secretary-General himself had stated that the possibility of placing the complainant elsewhere had been explored. (d) Even if attempts were made to find another post for the complainant, such attempts were adversely affected by a previous determination to terminate the complainant's appointment. Prejudice against the complainant was later proved by the memorandum of the Executive Assistant to the Secretary-General of November 3, 1954. (e) The Administration itself did not regard the complainant's appointment as Resident Representative in Haiti as fulfilling its obligations to find an alternative post for him, as the Administration itself stated that the appointment was not to be regarded as a reinstatement. (f) Even if it were assumed, contrary to the facts, that the complainant's assignment to the post of Resident Representative in Haiti was made in order to fulfil the Administration's obligations towards him, this assignment did not fulfil the purpose as it was made on the basis of a series of fixed-term appointments, whereas the complainant should have been seconded from his permanent appointment. Furthermore, the post of Resident Representative in Haiti was actually vacant before July 15, 1952, the date on which the notice of termination expired, although it had been stated that no suitable post would be available at that date. (g) The complainant had not sought employment in the United Nations; on the contrary, he had given up a post in his national civil service at the urgent invitation of the Secretary-General. His work subsequently as Principal Secretary of the Balkan Commission

and as Resident Representative in Haiti had been highly commended

The main contentions advanced on behalf of the Secretary-General were as follows: (a) Termination of the complainant's appointment was justified because upon the abolition of his post no alternative suitable post was available within the Secretariat, in spite of earnest efforts to find such post, which were not influenced by prejudice. The post of Resident Representative in Haiti offered to the complainant could not be regarded as having been vacant, since its incumbent was on temporary leave of absence. (b) The decision to terminate the complainant's appointment, which was confirmed after the complainant had been granted temporary employment as Resident Representative in Haiti, was based on " an objective examination of the complainant's file in the light of relevant provisions of the Charter of the United Nations and of the Staff Rules and Regulations applicable to permanent officials ". This decision was therefore not arbitrary. (c) The Secretary-General had had ample opportunity to evaluate the complainant's abilities and shortcomings, and had come to the conclusion that although the complainant showed himself capable in posts calling for diplomatic talents, he was almost completely lacking in administrative ability. Opportunities for suitable employment were therefore limited, and the Secretary-General was thus justified, both in fact and in law, in not taking favourable action on the recommendation of the Joint Appeals Board to restore the complainant to permanent employment status. (d) The complainant suffered no loss as a result of the termination of his appointment since his status as a French civil servant would enable him to return to his former position in the French Civil Service.

Held: that the application must succeed. Termination of complainant's appointment for abolition of post was unjustified. Arguments pertaining to the professional competence of the complainant were irrelevant, since his appointment had been terminated on grounds of abolition of post. On the other hand, there was a suitable post available at the time of termination, which should have been offered to the complainant. Acceptance of this post would not have involved a curtailment of the complainant's rights under his permanent (indeterminate) contract. The complaint was well-founded; therefore, the termination of his appointment must be rescinded and the complainant be reinstated.

The Tribunal said: " . . . In their written statements the parties have given at length a recital of the services and merits of the Applicant, including the opinions held of him by his superiors, and have fully commented thereon. The Tribunal observes, however, that the reason argued for the termination of the Applicant's appointment was the abolition of his post and not unsatisfactory services. It is to be pointed out that the Applicant, who entered the service of the organisation on 15 March 1946, had his permanent contract confirmed on 14 March 1947, and that the Special Committee for the Five-Year Review of Permanent Contracts informed the Secretary-General on 2 February 1952 [that]

' The Committee met on 29th of January 1952, to consider the case of Mr. Aglion. After an interview with Mr. Aglion and a full review of the file, it does not appear to the Committee that the performance of Mr. Aglion can justify a change in his present status. The Committee was informed of the difficulties of reassignment of Mr. Aglion when his present function is terminated. This, however, is not its concern.'

It therefore will be unnecessary for the Tribunal to consider the professional merits of the Applicant.

" . . . It is not contested by the parties that at the time the decision to terminate was taken, on 3 April 1952, the Staff Rule then applicable to termination due to abolition of posts was Rule 104, which reads as follows:

> ' In the termination of appointments due to reduction in force or abolition of posts, due consideration shall be given to the terms of the appointments, competence and integrity, nationality from the point of view of over-all geographical distribution, and length of service.'

Nor is it contested that the interpretation and conditions of the Administrative Manual concerning that rule were as set forth below:

'INTERPRETATION AND CONDITIONS[1]

'ORDER OF TERMINATION

' When it is necessary to terminate staff members because of abolition of posts or budgetary cuts, the following considerations shall be applied:

—the holder of an indeterminate appointment or a fixed-term appointment which has more than three months to run shall be terminated only if it is impossible to find a suitable vacancy elsewhere in which his skill and experience can be used to the fullest extent. To make room for such a person, a staff member holding temporary-indefinite appointment shall be terminated. Holders of indeterminate appointments have priority over holders of fixed-term appointments;

—the holder of a temporary-indefinite appointment or a fixed-term appointment with less than three months to run shall be terminated unless there is a thoroughly suitable vacancy elsewhere in which the Bureau of Personnel can place him without prejudice to the possibility of filling it with a holder of a higher priority appointment or with a better qualified external candidate;

—terminations of all types of appointments shall take into account the following in the order named: competence and integrity; nationality from the point of view of over-all geographical distribution, in cases where staff members have not completed five years of service; length of service.'

" It is evident that under the foregoing Staff Rule and the interpretation being applied by the Secretary-General at the time involved here, the Secretary-General was required to make a reasonably diligent and effective search for any vacant post to which the holder of an indeterminate contract whose post had been abolished, could be assigned.

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[1] *Administrative Manual*, Chapter VI, Section 6.

" The Respondent, relying upon a memorandum from the Director of Personnel to the Secretary-General dated 3 April 1952, contended that the necessary inquiries were made, but without success. The Applicant, however, cites the terms of the letter from the Assistant Secretary-General for Administrative and Financial Services, dated 28 July 1952, in which it was said that ' there was no reasonable prospect ' that the Applicant would have a post on his return [from Greece], and infers therefrom that suitable inquiries with a view to finding him a post had not in fact been made, and that to his mind the letter revealed the existence of a definite desire for his leaving the Organisation prompted by other and more personal reasons.

"As a preliminary question, it must be determined by the Tribunal how long the Respondent's inquiries should continue before the stipulations of Staff Rule 104 may be said to have been satisfied. Obviously one of two possible dates must be selected in this case: either the date of the notice of termination, or the effective date for the termination of the appointment.

" The Respondent, while not expressly standing on this point, apparently takes the view that the inquiries, the results of which are described in the memorandum from the Director of Personnel, dated 3 April 1952, as having been conducted prior to that date, constituted a sufficient discharge of his duties in that regard. The Applicant, on the other hand, argues that the post of Resident Representative in Haiti had become temporarily vacant before the expiry of the notice period, and that this presented an opportunity to satisfy the conditions of Staff Rule 104. The argument implies that in the Applicant's view, the search for a suitable post should have been continued after the beginning of the notice period and carried on until the effective date of the termination.

" The Tribunal observes that during the notice period staff members continue to enjoy all the rights and duties deriving from the Staff Rules and Regulations; it therefore follows that the Administration is under the duty, pursuant to Staff Rule 104, to continue its inquiries until the end of the service of holders of permanent contracts with the Organisation.

" In fact, that is the position which the Respondent seems to have taken toward the Applicant in a comparable situation in the year 1947 when, after serving notice of termination on 6 October 1947, he offered the Applicant on 29 October 1947 the post of Secretary to the United Nations Special Committee on the Balkans, which was accepted, and the appointment made.

" It appears from the file that the post of Resident Representative in Haiti was open on 28 May 1952, before the expiry of the notice period. In the light of the foregoing considerations, it is the opinion of the Tribunal that this post, if it met the requirements of Staff Rule 104, ought to have been offered to the Applicant, as the holder of a permanent contract.

" With regard to the nature of this post, the Administration, in the documents in the case, mentions only one reason why it should not have been filled under Staff Rule 104, namely, that it was not in fact a vacancy to be filled but simply the temporary replacement of the incumbent during his absence on leave for personal reasons. Neither in the Staff Regulations nor in the Staff Rules is there any provision which would prevent a holder of a permanent contract from being appointed to a post available for only a few months, if the member wishes to accept it and if, in other respects, the post satisfies the terms of Staff Rule 104. By reason of the nature of the United Nations activities there are bound to be unstable posts which have to be filled for short times only; it does not follow, however, that permanent contract holders may not be appointed to such posts.

" For the Secretary-General to recognise the prior right of the Applicant to this post would have been clearly within the spirit and meaning of the Report of the Preparatory Commission of the United Nations of 1946 concerning Duration of Appointments, and consonant with the well-established employment policy of the United Nations to offer such assurance of tenure as to encourage members of the staff holding indeterminate contracts to make their careers in the Secretariat.

" The record indicates that the temporary post in Haiti, discovered on or prior to 28 May 1952, was not offered to the Applicant as a permanent contract holder. When the existence and circumstances of the post were made known to him, he was given an opportunity to accept appointment to it under a fixed-term contract only. The post was that of Acting Resident Representative in Haiti under the Technical Assistance Board. At the time involved here, the practices of the Secretariat were fairly uniform with reference to the conditions of employment which would prevail in the case of a staff member moving to the service of the Technical Assistance Board. Within the same year, as of 31 December 1952, the United Nations and the Technical Assistance Board reduced the subject to a formal agreement and specific written understandings, doubtless for the purpose of clarifying the record.

" It is noted that this agreement undertakes to make available to the Technical Assistance Board Secretariat, United Nations staff members under one of three types of arrangement, namely: *secondment, loan, or transfer* (TAB/R/225, 8 January 1953). It was further provided between the contracting parties that ' persons seconded from the United Nations or participating organisations, would enjoy any re-employment rights obtaining at the time of secondment from such agency to the TAB Secretariat, and such rights, it is considered, would be preserved in accordance with the principles set forth in this paper, . . .' Moreover, it is provided also in Article III C.6 of this over-all undertaking that ' United Nations staff members serving under permanent appointment would normally be *seconded* [or loaned] for service with Technical Assistance Board, unless the staff member would, himself, prefer to be transferred ' (Emphasis added.)

" While there was no written agreement, such as the one referred to, in force at the time the temporary post in Haiti came to the notice of the Secretary-General, it is scarcely to be doubted that the practice of the Secretariat in dealing with the Technical Assistance Board followed the pattern which, within the year, was to be made explicit by these formal undertakings between the parties.

" Upon that assumption it appears to have been the clear duty of the Secretary-General to have informed the Applicant of the existence of the vacancy and to have offered him an opportunity to accept it on secondment which, under the rule previously quoted, was the normal practice which would have enabled him to accept the post and continue to enjoy the benefits and the emoluments provided by the rules governing his status as holder of an indeterminate contract with the United Nations.

" This was true for the reason that according to the Staff Rules of the United Nations Secretariat in effect at the time (ST/AFS/SGB/81/Rev.7, 26 May 1952, Staff Rules, Part I.1, page 6, Retention of Rights)

' (a) Regular staff members *detailed or transferred* to work in central administrative or indirect operational posts in the technical assistance establishments shall retain all rights under the terms of their appointments in the organisation ' (emphasis added).

" As the Applicant could have been offered the post in Haiti under his permanent contract and the arrangements used when United Nations staff members are made available to the Technical Assistance Board, the Tribunal arrives at the conclusion that the failure to make such an offer to the Applicant was not in conformity with Staff Rule 104. The letter of the Director of Personnel, dated 14 July 1952, offering the post to the Applicant on a temporary basis states ' this appointment will bear no relationship to your previous appointment in the United Nations Secretariat, and is not to be considered a reinstatement '.

" It is contended by the Respondent that the formal acceptance of the post under those conditions served to ratify the termination and to foreclose whatever claims he might otherwise have had to rights, benefits and emoluments under his indeterminate contract with the United Nations.

"The Staff Regulations afford a staff member, who considers that the Secretary-General has infringed upon his rights under the Staff Rules and Regulations, the right to apply to the Tribunal. The fact remains that, even after acceptance of the fixed-term appointment by the Applicant, the decision of termination of 3 April 1952 stands and that the Applicant retains his entire right, under the Staff Regulations, to ask for rescission.

"The employment of a staff member upon the basis of an indeterminate appointment carries with it certain continuing and cumulative rights, benefits, and emoluments which are incidental to that status. These are provided by the integral law of the United Nations consisting of the Charter, Regulations adopted by the General Assembly, Staff Rules promulgated by the Secretary-General, and the Statute and Rules of the Administrative Tribunal. It is not within the power or competence of the Secretary-General to withdraw or withhold these rights, benefits or emoluments, except only by appropriate action authorised under the established legal procedures for termination of indeterminate appointments. There can be no doubt that the Secretary-General has the power to terminate the permanent contract of a staff member upon the ground that the post which he occupies has been or is being abolished. But the right to exercise this power is not unlimited. It is conditioned, under the provisions of Staff Rule 104 and established employment policies and practices, upon the further fact that no other suitable post can be found for the permanent contract holder. In this case the record discloses that there was a post available before the expiration of the notice period of termination which, as subsequent events proved, was deemed suitable for the Applicant, both by the Secretary-General and by the Applicant himself.

"The words used in the fixed-term appointment contract meant only that the Administration did not intend to reverse its previous decision to dismiss the Applicant for abolition of post. It is possible that at that time it was not quite clear to the Administration that the existence of the post in Haiti really placed the Administration in the position of being obliged to reverse the decision of termination.

"Even though the Applicant had understood the conditions under which the appointment was offered to him, nevertheless he did not specifically surrender his right to contest the decision of 3 April 1952. The Tribunal holds that the discovery of the Haitian post had the effect of imposing upon the Administration a duty not to pursue the notice of termination further, leaving the Secretary-General no alternative but to place it at the disposal of the Applicant, as the controlling Rules and practices required. The right to this assignment included the retention by the Applicant of the rights, emoluments and benefits which are afforded to all staff members appointed and serving under indeterminate contracts. It follows that any later attempt to attach conditions not warranted by the

Regulations and Rules governing the transaction, was ineffectual to accomplish the surrender or relinquishment of the rights of the Applicant.

"The Applicant's status should not be affected by his assignment to a post by the United Nations with the Technical Assistance Board, but such assignment should be held to have occurred in the course of his continuing career under his indeterminate contract, and the completion of the mission upon which he is engaged should be followed by his return to whatever career duties in the Secretariat may be found suitable to him.

"The Tribunal finds that the application is well founded, and hereby rescinds the termination, of which notice was given to the Applicant by the Secretary-General as of 3 April 1952, effective as of 15 July 1952 and directs that the Secretary-General reinstate the Applicant in the full enjoyment of his appointed status as indeterminate contract holder, and it is further directed that he be restored to all the rights, emoluments and benefits appertaining thereto, as fully and completely as though no termination of his appointment had been made."

On the question of compensation, it was held that if the Secretary-General decided, in the interest of the United Nations, that the complainant should be compensated without further action being taken in his case, then the statutory termination indemnity must be paid.

The Tribunal said: "... If, within the period of 30 days following the receipt by the Secretary-General of notice of this judgment, the Secretary-General shall decide, in the interest of the United Nations, that the Applicant shall be compensated without further action being taken in his case, the Tribunal is required by the provisions of article 9 of its Statute, to fix the amount of compensation to be paid to the Applicant for the injury sustained by him through his termination, and by the decision of the Secretary-General to take no further action to restore his former status as holder of an indeterminate contract. Such amount would include the loss of remuneration representing the difference between the Applicant's earnings in Haiti and the earnings he would have received as a holder of a permanent contract, including any within-grade increases in the interval between the date of termination and this judgment as well as the adjustment of all other benefits provided in the Regulations and Rules.

"As to the injury sustained as a result of the Applicant's separation by decision of the Secretary-General, under article 9 of the Statute of the Tribunal, the Tribunal notes that the General Assembly has established by Regulations (Chapter IX) a system of payments as *Termination Indemnity*. In the present case, the situation of the Applicant is particularly favourable since he has been employed in his present assignment to Haiti throughout the whole period from the effective date of his termination, with emoluments fairly comparable with those which he would otherwise have enjoyed. The evidence indicates that his future prospects are favourable: the Tribunal was apprised during its proceedings that the Applicant has received a new fixed-term contract in Haiti up to 31 May 1955 and it is also aware that the Applicant is entitled to resume his career in his national civil service.

" The Tribunal therefore orders that the amount specified in the table of Termination Indemnity computed as of the date of this judgment shall be paid to the Applicant as compensation for prospective damages sustained, together with the sum representing the aforesaid difference in his earnings from the date of termination to the date of this judgment. It will be for the Administration to compute the total sum payable to the Applicant in conformity with the foregoing together with any other emoluments and benefits otherwise payable under the Regulations and accrued as of the date of this judgment."

The applicant also requested the destruction of the memorandum of November 3, 1954, (annex 24) and the prohibition of its communication to any agency which might consider engaging his services. Refusing this request, the Tribunal said : " The Tribunal holds that it is not within its competence to decide upon the destruction of any administrative document. The Tribunal considers, however, that in view of the nature of the document, which was addressed to the Secretary-General, it was intended for internal Secretariat use and accordingly should not be brought to the notice of any third party."

[Report: Judgment No. 56, United Nations Document AT/DEC/56.]

International Organizations—Officials—Dismissal of—Reasons for Dismissal—Permanent Appointments—Inquiries by National Authorities into Alleged Subversive Activities—Independence of International Civil Servants—Rights to Freedom of Opinion and Constitutional Guarantees—Administrative Inquiries—Refusal to Reply—Serious Misconduct—Summary Dismissal—Rules of Procedure—Absence of Acquired Rights.

WALLACH *v.* SECRETARY-GENERAL OF THE UNITED NATIONS.

Administrative Tribunal of the United Nations. May 29, 1954.

THE FACTS.—The complainant entered the service of the United Nations as a verbatim reporter on August 20, 1946. After serving on a temporary (later temporary-indefinite) contract, the complainant was on August 21, 1947, granted a permanent contract. At the time of his dismissal (on June 20, 1952), he held the post of editor-verbatim reporter. The complainant, who was a citizen of the United States of America, appeared on several occasions between June 9 and 19, 1952, before a United States Federal Grand Jury which was investigating alleged subversive activities on the part of United States citizens. As a result of press reports, according to which the complainant had refused to reply to certain questions put to him by the Grand Jury, relying on the privilege against self-incrimination embodied in the Fifth Amendment to the Constitution of the United States, the complainant was questioned on June 17, 18 and 20, 1952, by the Administration as to the accuracy of statements he had made on the application form submitted by him in 1946 with a view to securing employment with the United Nations. The complainant refused to answer certain questions put to him by the Administration, and on June 20, 1952, the Secretary-General notified the complainant that this refusal constituted serious misconduct and that he was therefore summarily dismissed, in accordance with the terms of Staff Regulation 10 (2). On June 30, 1952, the complainant requested the Administration to cancel the decision to dismiss him summarily. On July 9, 1952, he received an answer to the effect that the summary dismissal decision was maintained. The complainant filed an appeal with the Secretary of the Appeals Board. After receiving the Board's report on the case, the Secretary-General informed the complainant, on October 23, 1952, that he reaffirmed his decision of summary dismissal. The complainant thereupon lodged a complaint with the Tribunal and claimed reinstatement into his post. In addition to advancing a number of arguments on the merits of the case, to which the Secretary-General in turn replied, the complainant contended, *inter alia*, that the decision of the Joint Appeals Board " was basically jurisdictionally irregular by reason of the fact that the third representative, the staff representative—was not present consequent upon his withdrawal from the case and no steps were taken to summon the alternate representative."

Staff Rule 145 (a) of the rules applicable at the material time provided:

> " A Joint Appeals Board shall be established to advise the Secretary-General in case of any appeal by staff members against any administrative decision alleging the non-observance of contracts of appointment or regarding the application of rules and regulations and established administrative practices or against disciplinary action."

The Rule relating to the composition and procedure of the Appeals Board further provided that the Appeals Board should consist of three members, one appointed by the Secretary-General, another elected annually by ballot of the staff, and a chairman appointed by the Secretary-General after consultation with the Staff Committee. Provision was also made for alternates, selected in the same manner as titular members, who should replace titular members if the latter became unavailable or were disqualified. When the Appeals Board considered the complainant's case, the member elected by the annual ballot of the staff—having himself been asked questions by the Internal Security Sub-Committee of the United States Senate—had withdrawn from further participation on the Joint Appeals Board in connection with the complainant's appeal. The Chairman, in accordance with the applicable rules, had excused him from consideration of this case, but the next regular alternate, who was available, was not summoned or notified. The Joint Appeals Board proceeded to a conclusion with only two members present, namely, the Chairman and the member appointed by the Secretary-General. In reply to the complainant's contention that this voided the proceedings of the Appeals Board, it was argued on behalf of the Secretary-General that the complainant was given a full opportunity to present his case to the Joint Appeals Board, to which he had submitted a written brief. The complainant, when he received the Board's report, failed to make any protest against the absence of the Staff Representative's signature on the report.

Held: that the claim must be referred back to the Joint Appeals Board for re-hearing. The proceedings of the Joint Appeals Board were not valid, with the result that the submission of the case to the judgment of the Tribunal was not in accordance with Article 7, paragraph 1, of the Statute of the Tribunal, which provided:

> "An application shall not be receivable unless the person concerned has previously submitted the dispute to the Joint Appeals Board provided for in the Staff Regulations and the latter has communicated its opinion to the Secretary-General . . ."

[Report: Judgment No. 28, August 21, 1953, United Nations Document AT/DEC/28.]

Following upon this first decision, the case was re-submitted to a regularly constituted Joint Appeals Board, which submitted its report to the Secretary-General on January 7, 1954. On February 16, 1954, the Secretary-General confirmed his earlier decision to dismiss the complainant summarily for serious misconduct. The complainant thereupon lodged a complaint with the Administrative Tribunal, claiming reinstatement, together with salary and indemnities for the period which had elapsed between the termination of his appointment and the judgment ordering his reinstatement. He made the following main submissions: (a) The procedure resorted to by the Secretary-General prior to the dismissal of the complainant was irregular, and his failure to refer the case to the Joint Disciplinary Committee violated the terms of Staff Rule 140 (c) of 1 July 1951 which the complainant claimed to be applicable to him by virtue of acquired rights, in spite of later amendments. (b) The dismissal resulted from an illegal agreement between the Secretary-General and the Department of State of the United States of America to eliminate officials on political grounds, and was therefore in violation of the Charter and the Staff Regulations. (c) The dismissal resulted from pressure improperly exercised by the United States of America upon the United Nations in violation of the Charter. (d) The dismissal violated the Complainant's right to independent political convictions, as guaranteed to the staff by the Staff Regulations, and infringed the rights set forth in the Universal Declaration of Human Rights. (e) The complainant denied that his conduct had been unsatisfactory, and contended that in any case summary dismissal could not be justified under the Staff Regulations unless the misconduct was of an obviously flagrant and reprehensible nature.

In reply, the following main contentions were advanced on behalf of the Secretary-General: (a) The Secretary-General was obliged to inquire into the question whether the complainant had deliberately withheld material information in his application for employment by the United Nations. (b) The complainant's refusal to answer questions put by his superior officers gave rise to the inference of fraud and constituted serious misconduct justifying summary dismissal. (c) The Secretary-General was empowered to decide upon summary dismissal for serious misconduct without reference to the Joint Disciplinary Committee, under the powers granted to him by the new Staff Regulations. The complainant could not invoke the protection of acquired rights with respect to matters of procedure. (d) There was no improper connection between the action taken by the Secretary-General and the investigation by the United States Federal Grand Jury with respect to the complainant, nor were the complainant's political opinions made a ground for his dismissal. (e) Modifications of procedure which were introduced after the appointment of the complainant fell into the " Statutory Category " referred to in Judgments No. 19–25 and 27, and " acquired rights " could not, therefore, be invoked in that respect.

Held: that the claim must be rejected. The procedure adopted by the Secretary-General had not been irregular, the Tribunal was not competent to enquire into the validity of an alleged agreement between the Secretary-General and a Member State concerning the transmission of information relating to officials; the Secretary-General was not bound to refer the case to the Joint Disciplinary Committee; and the complainant's refusal to reply to questions put to him by representatives of the Secretary-General amounted to serious misconduct which warranted summary dismissal.

The Tribunal said: " . . . under its Statute, the Tribunal is not competent to pass judgment on the validity, in relation to the Charter, of an agreement made between the Secretary-General and a Member State, whatever influence this agreement may actually have had on the decision taken in regard to the Applicant. It is the Tribunal's duty, however, to consider whether the termination of the Applicant's appointment is in conformity with the provisions of the Staff Rules and Regulations".

With regard to the question whether the Secretary-General was obliged to refer the complainant's case to the Joint Disciplinary Committee before proceeding to a summary dismissal, the Tribunal found that the procedure to be followed in the case of disciplinary measures involved a statutory element and was subject to amendment by the General Assembly of the United Nations. In consequence, the doctrine of acquired rights could not be invoked against the application of a procedure adopted after the entry in service of the Complainant, and the new rule empowering the Secretary-General to proceed to summary dismissal without previous reference to the Joint Disciplinary Committee was immediately binding upon all officials. The Tribunal said: " . . . The Applicant contends that his employment contract included Staff Regulation 23 (a) and Staff Rule 140 (c) which did not permit the Secretary-General to take any disciplinary action without prior submission to the Joint Disciplinary Committee. Even if Staff Rule 140 (c) was no longer effective in consequence of the new Staff Regulation 10 adopted at the sixth session of the General Assembly and in force on 1 March 1952, the Applicant contends that he had acquired the contractual right to the procedures and guarantees established by the terms of Staff Rule 140 (c). He submits that relations between the United Nations and its staff are contractual in nature and that consequently the two parties are bound by the contract and neither party may change its provisions without the consent of the other.

" He points out in addition that Regulation 28 of the former Staff Regulations states that: 'These regulations may be supplemented or amended by the General Assembly, without prejudice to the acquired rights of members of the staff'; and that this provision was reproduced in Regulation 12.1 of the new Staff Regulations. Accordingly the principles of contract law as well as the express provisions of the Secretariat employment contract precludes any deprivation of Applicant's established rights to the Joint Disciplinary Committee safeguards.

" The Tribunal considers that relations between staff members and the United Nations involve various elements and are consequently not solely contractual in nature. Article 101 of the Charter gives the General Assembly the right to establish regulations for the appointment of the staff, and consequently the right to change them. The General Assembly under that Article established new Staff Regulations and decided that these new Staff Regulations should become effective on 1 March 1952 and supersede all previous staff regulations. It follows from the foregoing that notwithstanding the existence of contracts between the United Nations and staff members, the legal regulations governing the staff are established by the General Assembly of the United Nations.

" In determining the legal position of staff members a distinction should be made between contractual elements and statutory elements: all matters being contractual which affect the personal status of each staff member, e.g., nature of his contract, salary grade; all matters being statutory which affect in general the organisation of the international civil service, and the need for its proper functioning, e.g., general rules that have no personal reference.

" While the contractual elements cannot be changed without the agreement of the two parties, the statutory elements on the other hand may always be changed at any time through regulations established by the General Assembly, and these changes are binding on staff members. The Tribunal interprets the provisions of Regulation 28 of the Provisional Staff Regulations and Article XII of the new Staff Regulations in this manner.

" With regard to the case under consideration the Tribunal decides that a statutory element is involved and that in fact the question of the procedure to be followed in the case of disciplinary measures is one of a general rule subject to amendment by the General Assembly and against which acquired rights cannot be invoked. Consequently Staff Regulation 10.2 which gives the Secretary-General the power to make summary dismissal for serious misconduct has been immediately binding on all members of the staff."

With regard to the refusal of the Complainant to reply to questions put to him by representatives of the Secretary-General and pertaining to his original application for employment with the United Nations, the Tribunal said: " . . . The Applicant submits that the extreme summary dismissal penalty could be justified only when the proven misconduct obstructs the work or endangers the safety of the Secretariat organisation or when acts of immorality are perpetrated in the course of official duties. In earlier judgments the Tribunal has stated that the conception of serious misconduct enabling the Secretary-General to inflict summary dismissal without disciplinary procedure was introduced at the revision of the Staff Regulations to deal with acts obviously incompatible with continued membership of the staff. Except in cases of agreement between the person concerned and the Administration, the disciplinary procedure should be dispensed with only in those cases where the misconduct is patent and where the interest of the service requires immediate and final dismissal.

" In the present case, the Applicant contends that the interviews which led to his dismissal were merely a repetition of the hearing he had undergone before the Federal Grand Jury, and concerned only his past political affiliations, without any connection with the performance of his professional duties. He states that he failed to answer the questions on the grounds, *inter alia*, of his apprehension that the answers given by him to a staff member was who a United States national then subject to interrogation by the United States authorities, might be communicated to those authorities in the course of the interrogation. The Tribunal notes that the Applicant's summary dismissal took place after three interviews with the principal Director of his Department and the Director of Personnel. In the course of these interviews, the Applicant had certain questions put to him, which concerned primarily the accuracy of the information supplied by him in the application form he had completed before entering the service of the United Nations. In this connection, he was examined about his appearance before the Grand Jury and as to allegations that he had worked for the Communist Party in 1945 or 1946. The Tribunal notes that the Applicant in fact failed to answer such questions.

" The Tribunal observes that the questions put to the Applicant were related to certain replies given by him in his original application form completed before entering the service of the United Nations. This document is purely administrative. It is clear that, for an international organisation, the accuracy of the information thus supplied by candidates applying for a post is most important. In these circumstances, it is to be expected that any suspicion of inaccuracy should be the subject of an administrative inquiry which the Secretary-General, in his capacity as Chief of the Administration, is entitled to prescribe, and to which the interested parties are obviously bound to submit.

" The Applicant had been warned that his attitude might entail serious consequence to his administrative career. He had been reminded that he had signed a declaration at the foot of his application form (the text of which had been recalled to his attention during the interviews) in the following terms:

> ' I, the undersigned, certify that the statements made by me above are full and true to the best of my knowledge and belief. I understand that any wilful mis-statement renders me liable to instant dismissal, if employed.'

" Prior to the last interview on 20 June 1952, the Applicant received a written notice from the Director of Personnel, stating that ' your continued failure to answer questions bearing on the truth or falsity of statements which you have made in your employment application to the United Nations constitutes serious misconduct and cause for summary dismissal.' The Applicant's persistent refusal to answer, and his demands for specific guarantees in the course of an administrative inquiry of this nature, could properly have been considered by the Secretary-General, as ' acts obviously incompatible with continued membership of the staff ' which accordingly justify the summary dismissal of the official concerned.

"Now, therefore, the Tribunal rejects the Applicant's claim."

[Report: Judgment No. 53, United Nations Document AT/DEC/53.]

Note.—With respect to the communication of information by Member States to the Secretary-General of the United Nations concerning officials of the organization, see *Crawford* v. *Secretary-General of the United Nations* (*International Law Reports*, 1953, p. 501, Note (2)). With respect to the validity of an alleged agreement between the Secretary-General and a Member State concerning the transmission of information pertaining to officials, the Tribunal's jurisprudence has never deviated from the original decision on the subject in *Kaplan* v. *Secretary-General of the United Nations* (*International Law Reports*, 1953, p. 506). With respect to the question of acquired rights and judgments No. 19–25 and 27, see *Crawford* v. *Secretary General of the United Nations* (*supra*). With respect to the appearance of United States citizens employed by the United Nations as witnesses before United States Federal Grand Juries, see *Crawford* v. *Secretary-General of the United Nations* (*supra,* Note (1)). With respect to the dismissal of permanent officials of the United Nations as a result of enquiries by national authorities into alleged subversive activities, compare and contrast *Gordon* v. *Secretary-General of the United Nations* (*International Law Reports*, 1953, p. 493).

International Organizations—Officials of—Termination of Appointments—Review of Status of Officials Serving on Temporary Contracts—Use of Discretionary Powers—Primacy of Regulations over Administrative Rules—Inducement to Contract—Absence of Specific Undertakings.

Russell-Cobb *v.* Secretary-General of the United Nations.

Administrative Tribunal of the United Nations. December 14, 1954.

The Facts.—The Geneva Branch of the Technical Assistance Administration of the United Nations requested the British Council, for which the complainant had been working since 1946, to place him at its disposal for a period of six weeks from October 25, 1951. On November 13, 1951, the principal representative of the Geneva Branch of the Technical Assistance Administration asked the British Council to release the complainant so that he could take up a post in the United Nations. The complainant took up his duties on January 2, 1952, under a one-year contract, as Technical Assistance Officer at Geneva. He was granted a further one-year contract on January 1, 1953, and on December 17, 1953, he received a temporary-indefinite appointment. On May 19, 1954, the Chief of the Personnel Division at Geneva informed him that it had been decided to terminate his appointment with effect from June 30, 1954, in accordance with Regulation 9.1 (c), which empowered the Secretary-General to terminate certain appointments, including temporary-indefinite appointments, at any time if in his opinion such action would be in the interest of the United Nations. In reply to an oral inquiry by the complainant, the Chief of the Personnel Division (Geneva) informed him in a letter dated May 25, 1954, that the decision to terminate his appointment had been made necessary by a " reduction in strength as the result of budgetary limitations ". On June 1, 1954, the Complainant asked the Director of the European Office at the United Nations to reconsider the decision to terminate his appointment. On June 16, having received no reply, the complainant submitted his case to the internal Appeals Board. In a report dated June 30, 1954, the Board recommended that the decision to terminate the complainant's appointment on June 30, 1954, be reconsidered, that the complainant's case be reviewed at the forthcoming session of the Review Board (which was to advise the Secretary-General on the grant of permanent appointments to temporary officials or the termination of their appointment), and that a further thorough search for alternative employment be undertaken. On June 14, 1954, the Secretary-General wrote to the complainant to confirm the decision to terminate his appointment. The complainant then lodged a complaint with the Tribunal.

The following main contentions were advanced by the complainant: (a) There had been a breach of the rules laid down in the Secretary-General's instruction (ST/SGB/94/Amend. 1) in that the complainant was not retained in his position until his position had been examined by the Review Board which under that instruction was required to review the status of all officials upon completion of a two-year period of probationary service, served as on a temporary-indefinite contract. (b) There had been a further breach of these rules in that the complainant was not called upon to appear before the Review Board. The appearance before the Review Board of an official who had completed a probationary period of two years was a right which the Secretary-General could not deny, since an official was necessarily a candidate for permanent appointment if he had served for two years on a temporary-indefinite contract. (c) An official's appointment could not be terminated during the period of probation because of budgetary reductions unless his qualifications were first fairly and exhaustively examined. Although the relevant provision of the Staff Regulations provided that officials holding permanent appointments should as a general rule be retained in preference to those holding other types of appointment, it also provided that the Administration should give due regard to the competence of the persons concerned and to their nationality from the point of view of geographical distribution of the staff. No such examination of the complainant's qualifications and competence had taken place, and his immediate superiors were not consulted. (d) The termination of the complainant's appointment had taken place without the Administration making a genuine effort to find suitable alternative employment for him. The steps taken in that direction were undertaken as empty administrative formalities, with no sincere desire that they should be successful. (e) The manner in which the termination of the complainant's appointment was brought about not only violated statutory provisions but also constituted a breach of contractual obligations. Assurances for the future were given to the complainant as an inducement to contract, and the termination of the complainant's appointment constituted a violation of the defendant's obligations, for which compensation was due. (f) Alternatively, considerations having no relation to budgetary exigencies worked to the detriment of the complainant. The official who eventually replaced him was transferred to Geneva prior to the termination of the complainant's contract and without consultation of the complainant's chief.

Should the Tribunal not accept the foregoing contentions, the complainant offered to prove that he had been the victim of manoeuvres unconnected with his competence.

The following contentions were advanced on behalf of the Secretary-General: (a) The termination of the Complainant's appointment took place in accordance with the provisions of Staff Regulations 9.1.(c) which empowered the Secretary-General to terminate his appointment at any time if, in his opinion, such action was in the interest of the United Nations and was, therefore, entirely proper. (b) The rules laid down in the Secretary-General's instruction (ST/SGB/94/Amend.1) providing for the examination by the Review Board of the status of officials upon a two-year period of probationary service did not affect the Secretary-General's authority to terminate temporary appointments. The transitional measure provided for in that instruction must be construed in the context of the instruction. To accept the complainant's contention that the transitional measure made his appointment immune from termination would be tantamount to suspending the application of the Staff Regulations relating to termination. (c) The needs of the service required the termination of the complainant's appointment, and the decision to abolish the post occupied by him was the subject of discussions between Headquarters and the Director of the European Office of the United Nations at Geneva. (d) The Administration explored every avenue to find other employment for the complainant in the Secretariat of the United Nations or in another international organization, and the complainant was advised of two possible appointments, which he declined to accept. (e) The complainant ought to have realized that a temporary appointment with the Technical Assistance Administration could not, in view of the financial basis of that Administration, guarantee a permanent career with the United Nations. [The Expanded Technical Assistance Programme of the United Nations, which was administered, in part, by the United Nations Technical Assistance Administration, and which was distinct from the regular budget of the United Nations and the specialized agencies, was financed through voluntary contributions of States, determined each year at a " pledging conference ", and the level of which was subject to annual and sometimes unpredictable variations.]

Held: that the claim must be dismissed. The complainant was entitled under the transitional rules made by the Secretary-General to have his status reviewed by the Review Board after completion of two years of service on a temporary contract, and the Secretary-General had violated the applicable rules in denying the complainant this opportunity. Transitional measures provided for in administrative regulations made by the Secretary-General were binding upon him and had the legal force of a provision of the Staff Rules and Regulations. The complainant's right to a review of his status by the Review Board did not, however, preclude the application of the normal rules governing the termination of temporary appointments. The operation of the Staff Rules could not be suspended by administrative regulations, and he was not entitled to be retained in service until his status had been reviewed. The non-observance of the obligation to review the complainant's status did not, moreover, invalidate the decision to terminate his appointment, seeing that a recommendation for permanent appointment did not bind the Secretary-General to grant such an appointment. Appropriate steps had been taken by the Secretary-General to seek alternative employment for the complainant, and the failure to find such employment did not invalidate the decision to terminate his appointment.

As regards the contention that obligations had been incurred towards the complainant by offering inducement to contract, the Tribunal found that general assurances of permanency were implied in error, but that no specific undertaking had been violated. The Tribunal rejected the allegation that the undue preference for another official had been made a pretext for the termination of the complainant's appointment, and found that a reduction of staff had in fact taken place. The Tribunal was not, however, competent to deal with the merits of reorganization measures which ensued. The reason for the termination of the complainant's appointment had substance, and had not, therefore, been wrongly stated.

The Tribunal said: " . . . The principal object of the application is to secure a judgment by the Tribunal that the decision to terminate the Applicant's appointment, taken on 19 May 1954, was taken in breach of the Staff Rules and Regulations. The Tribunal notes that in terminating the employment of the Applicant, who held a temporary-indefinite appointment, the Respondent relied on regulation 9.1 (c) of the Staff Regulations, under which the Secretary-General may at any time terminate the appointment of a staff member having neither a permanent appointment nor a fixed-term appointment if, in his opinion, such action would be in the interest of the United Nations.

" In response to the Applicant's request for a statement of the reasons for which his appointment had been terminated, the Respondent stated that the termination had been made necessary by a ' reduction in strength as the result of budgetary limitations '. In challenging that decision, the Applicant advanced first of all various arguments derived from Bulletin ST/SGB/94/Amend.1 of 8 March 1954, which prescribes that staff members holding temporary-indefinite appointments shall, after they have completed two years of service, be considered for permanent or regular appointment or with a view to their separation from the service or to the extension of their period of probationary service. According to the Applicant the provisions of this Bulletin, having become an integral part of the Staff Rules, regularized the status of a staff member holding a probationary appointment by affording him a double guarantee: (1) continuance in his post until his status has been reviewed by the Review Board, and (2) a review of his status, after a period of two years, with a view to its regularisation.

" Being automatically a candidate for a permanent appointment, a staff member who has completed his probationary service satisfactorily would thus have a special status. The Administration would retain the ability to limit its duration by undertaking the review prescribed in the Bulletin, but the Bulletin would guarantee that the staff member would be retained in his post until the Review Board met. The Applicant argues that only the prior review of his status by the Review Board would have made it possible for rule 109.1 of the Staff Rules, relating to the selection of staff members for retention in the event of a reduction of staff, to be applied to him fairly. Both the Applicant's periodic reports and the opinion of his superiors excluded any doubt that he would have been granted a permanent appointment which would have given him the same appointment status as the staff member who was given the preference over him. The Applicant further argues that the Administration, by delaying the appearance of a staff member before the Review Board, prolongs the probationary period in violation of the Staff Regulations.

" The Respondent replies that the transitional measure contained in the aforementioned Bulletin did not affect the authority of the Secretary-General to terminate the Applicant's appointment in accordance with the Staff Regulations and Rules. Any other interpretation would expand the scope of the transitional measure, which was intended to meet a particular situation, to an unrelated area. Furthermore, the Secretary-General had no authority to alter the application of the Staff Regulations and Rules applicable to the termination of temporary-indefinite appointments, which were adopted by the General Assembly. Consideration of the Applicant's case by the Review Board would have been indefensible administrative action, since the decision to abolish the Applicant's post had been taken at the end of November 1953 and there was no position for him in the Organisation.

" The Tribunal notes that it is clear from the Secretary-General's Bulletin of 8 March 1954 that the rule relating to staff members holding temporary-indefinite appointments, while of a temporary nature, has the legal force of a provision of the Staff Rules and Regulations, non-observance of which can be pleaded before the Tribunal under Article 2 of its Statute. By stipulating that staff members who on 15 March 1954 are holders of temporary-indefinite appointments 'shall be retained in their present appointment status', the text precludes the immediate application to such staff members of the Staff Rules revised in consequence of amendments made to the Staff Regulations by the General Assembly at its eighth session.

" Whereas in future, temporary-indefinite appointments will be strictly reserved for restricted categories of staff members, present holders of this type of appointment are subject to no immediate change in the nature of their appointments. However, in accordance with the desire expressed by the General Assembly that this type of appointment should be abolished in principle, the transitional measure prescribes that after two years of service the status of staff members holding such appointments shall be reviewed, with a view to determining their future, in accordance with the general system provided for in the new Staff Rules: either a permanent or regular appointment, or separation from the service, or if necessary an extension of the period of probationary service for not more than one additional year.

" In making these stipulations, the Staff Rules do not merely offer the Administration the opportunity of undertaking such a review; they do not create a favour that the Administration may grant as it deems fit. They prescribe a procedure of review the application of which those concerned are entitled to demand. While the date on which the said procedure is to be instituted is not fixed by regulation, it is clear that the text does not confine itself to fixing the date of commencement of the period during which the review must be undertaken: the review must in fact be undertaken ' after the completion of the period ', and the period of probation may be extended by administrative decision only in exceptional circumstances, and then only for a period not exceeding one year. The principle of not extending the period of probation beyond two years as a general rule would not be compatible with an administrative practice whereby action by the Review Board was delayed.

" The Applicant had completed more than two years of service on 15 March 1954. He was entitled to have his status reviewed. The decision to terminate his appointment was taken on 18 May 1954, and his employment continued until 30 June 1954. The Respondent has not submitted arguments showing that it was impossible to undertake, before that date, the review prescribed by a rule whose application the Applicant had requested on 8 April 1954. The Tribunal cannot accept the Respondent's argument that such a review would have been an indefensible administrative action because the decision to abolish the Applicant's post had been taken previously. The Respondent appears to disregard the fact that the review of a staff member's status results in a recommendation by the Review Board to the Secretary-General which, even if it is favourable, does not necessarily entail the granting of an appointment in the Organisation by the Secretary-General. However, a review by the Review Board would have been of interest to the Administration in the conceivable event that a vacancy suitable for the Applicant had occurred before he left his post. Moreover, the result of such a review, if favourable, might have facilitated the Applicant's entry into the service of another agency.

"The Tribunal therefore concludes that the Respondent has failed to abide by the obligations assumed by it under the transitional measure contained in the Bulletin of 8 March 1954, and no acceptable explanation justifying its behaviour has been submitted. It does not follow, however, that the Applicant was entitled to retain his appointment until his status had been reviewed by the Review Board without being subject to the Staff Rules relating to termination. In stipulating that holders of temporary-indefinite appointments shall be retained in their present appointment status, the transtitional measure contained in the Bulletin of 8 March 1954 necessarily implies that the rules on termination applicable to such staff members continue in force. Those rules, prescribed by the Staff Rules, cannot be suspended by an administrative regulation. Nor can the Tribunal find that non-observance of the obligation to review the Applicant's status voids the decision to terminate his employment.

"The Tribunal notes that if such a review by the Review Board had resulted in a recommendation that the Applicant should be granted a permanent appointment, it would not have been binding upon the Secretary-General. Even if the Applicant had received such an appointment, the provisions of rule 109.1 concerning the selection of staff members to be retained in the event of a reduction of staff would have left the Administration wide discretionary powers. In the absence therefore of any provision in the Staff Rules, it is impossible to conclude that a review by the Review Board is a condition on which the validity of the decision to terminate a staff member's employment depends.

The Applicant further argues that the administrative action, the aim and inevitable result of which was his replacement, had been decided upon without consultation with his immediate supervisors which alone could have enabled his case to be fairly reviewed. The Tribunal is bound to point out that it is clear from the documents produced that the future of the Applicant's post had been discussed between the Director of the European Office of the Technical Assistance Administration and the Director of the Administrative Division, Technical Assistance Administration, as early as November 1953. It appears from the file that the Applicant's immediate supervisors had the most favourable opinion of his qualifications, services and abilities, and wished to retain him. There is no doubt that they did in fact fully inform the Administration. Their opinion was known, even though it did not prevail. In such matters it is for the Secretary-General, and not for the Tribunal, to make the choice. Similarly, the Tribunal is not required to express an opinion on the administrative value of the reorganisation of the technical assistance service at Geneva, or on the opinions expressed in connection therewith.

" With regard to the complaint that the termination of the Applicant's appointment was irregular because it was not preceded by a proper search for another post for the Applicant, the Respondent argues that, although it had no legal obligation in this respect, it explored every possible avenue to place the Applicant within the United Nations or with another international organisation. The Tribunal holds that it ensues from rule 109.1 of the Staff Rules that if the necessities of the service require that the appointments of staff members be terminated as a result of abolition of posts or reduction of staff, the Administration is bound to make enquiries to ascertain whether there are any posts available which are appropriate to the abilities of the staff members concerned and in which they can be usefully employed. That obligation was implicitly recognised in the circular IC/Geneva/444, Secretariat European Office, of 17 March 1954, which, while recognising the difficulty of making satisfactory arrangements in respect of staff on the senior administrative levels, states: ' Every effort will be made to find for such officials other assignments in the Organisation appropriate to their competence.'

" While the Applicant does not deny that some enquiries were made, he criticises the Administration's action as ' formal ' and ' belated '. The Tribunal is bound to note that while the approaches to other international organisations were made at the time of the Applicant's termination, it is clear from the file that several months before the decision the competent departments of the Secretariat were advised of the Applicant's forthcoming termination, the reasons for the termination, and the Applicant's qualifications. The Tribunal has no grounds for believing that the exchanges of correspondence regarding the attempt to find him a post in the United Nations do not reflect the truth. It is not in a position to determine whether other opportunities might have arisen at a certain stage. Furthermore it is bound to point out that, while these enquiries did not produce any proposal which the Applicant considered satisfactory, they nevertheless had some results. The Tribunal accordingly does not consider that the Administration's action in this respect invalidates the decision to terminate the Applicant.

" The Applicant has stated that on his appointment to the United Nations, which the Administration had pressed him to accept, he received tacit but undeniable assurances with regard to his career in the Organisation; that his consent to the contract whereby he became a staff member was influenced by factors of greater substance than mere expectations; and that, even assuming his appointment could be terminated in the international public interest, he should be compensated for the serious loss he had sustained. The Tribunal recognises that the Applicant was urged to join the United Nations and that the terms employed by the Senior Representative of the Technical Assistance Administration in his letter to the British Council, the Applicant's employer, were such as to imply a conviction on the part of that official that the Applicant would be perfectly suitable for the post—which was in fact the case—and that he could be employed on a long-term basis. The Tribunal regrets that in his keen desire to secure the appointment of a capable person of proven ability the responsible official was not prompted by his knowledge of the financial basis of Technical Assistance to mention the problems which might arise with regard to continuity of employment even in the case of a person whose services were entirely satisfactory. The Tribunal points out that when the appointment was offered to the Applicant, who had recently completed several weeks' service in the employment of the United Nations, no indication was given that it was temporary. Be that as it may, it does not appear that so far as the duration of his appointment was concerned the Applicant was explicitly given any specific undertakings disregard of which would engage the liability of the Respondent.

" Lastly, the Applicant states that the nature of his post was changed and another staff member appointed to it owing to factors unrelated to budgetary reasons. He maintains that the Administration wished to find a post in Europe for the official who superseded him, and describes what he terms the ' strange circumstances ' in which his successor was transferred. The Tribunal notes that a reduction in the budget of Technical Assistance led to the abolition of some posts and to a reorganisation of the services at Geneva which involved extending the duties of the Applicant's successor. Furthermore, the latter's professional qualifications and the length of service with the United Nations are not in question. In these circumstances the Tribunal is not in a position to judge the circumstances in which the Applicant's successor took up his post, the importance of a knowledge of French in that post, or the administrative value of the reorganisation effected. In any case, it does not appear that reduction in strength as the result of budgetary limitations was wrongly stated as the reason for the Applicant's termination.

" Lastly, the Applicant considers that certain manoeuvres—perhaps unknown to the Administration—militated against him. In his memorandum of 20 November 1954 he asks the Tribunal to institute an enquiry and states that he is prepared to produce certain documents and evidence. It should be noted that in so doing the Applicant refers to the absence of any examination of his position and the inadequacy of the efforts made to find him employment. The Tribunal, having already dealt with these two points, does not consider it necessary to institute the enquiry requested by the Applicant. Whatever the results of such an enquiry, the Tribunal does not see how they could affect the conclusions set forth . . . above.

" For these reasons the Tribunal, while noting the failure to comply with an obligation under the Regulations, is bound to dismiss the application there being no necessary legal connection between such failure and the decision to terminate the Applicant."

[Report: Judgment No. 55, United Nations Document AT/DEC/55].

International Organizations—Officials—Termination of Employment—Reduction of Staff—Distinction between Technical Assistance Staff and Regular Establishment Staff—Priority of Permanent Officials over Temporary Officials for Retention in Service—Discretionary Powers of Director-General of Food and Agriculture Organization.

TRANTER *v.* FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS.

Administrative Tribunal of the International Labour Organization. September 3, 1954.

THE FACTS.—The complainant entered the service of the Food and Agriculture Organization of the United Nations (F.A.O.) as a shorthand-typist on April 1, 1951. She was first granted a temporary appointment for one year, subject to a three-months' period of probation which she served successfully. On April 4, 1952, the complainant's temporary appointment was converted to a five-year appointment expiring on April 1, 1956. The period of temporary service was regarded as a satisfactory trial period and the grant of the five-year appointment was not made subject to a period of probation. Moreover, the complainant was awarded an annual salary increment for satisfactory services. Towards the end of the year 1952, most of the temporary contracts having, in accordance with a decision of the F.A.O. Council, been converted into permanent appointments, the appointment of the complainant was converted into a permanent appointment with effect from July 1, 1952, the first year of employment to count as a year of probation. On December 12, 1952, the complainant's superior addressed to his own superior a note stating that " in the course of the past six months Miss Tranter's health and attitude to her work had deteriorated; her work in [the] section [to which she was attached] was now unsatisfactory. Miss Tranter knew this. She had applied for a transfer to another part of the Organization and prepared to see the F.A.O. medical officer ". Subsequently, according to the defendant Organization, the conduct of the complainant changed to such an extent that she refused to carry out a specific task assigned to her, for which she was orally reprimanded by her superiors. On December 17, 1952, the complainant having stated some days previously that she was in poor health as a result of nervous depression, the Director of the division to which she belonged asked the administrative services to have her examined by the medical officer, who, in a report dated January 29, 1953, stated that the state of health of the complainant was " satisfactory, without limitation ". The complainant thereafter tried, on a number of occasions, to change her post in the Organization in order to find duties which would, in her opinion, be better suited to her experience and abilities. On April 1, 1953, the complainant was awarded a further annual salary increment for satisfactory services. At the beginning of July 1953, the complainant was authorized to proceed on home leave as from July 6, 1953. Under the procedure in force at the material time, the Director of the division concerned had to certify, when he approved a request for home leave, that it was expected that the services of the official proceeding on home leave would be required for a period of at least twelve months following the return to duty. This procedure was designed to establish that the suppression of the post within this period was not envisaged and to specify that the Organization would not be called upon to bear, during those twelve months, both home leave and repatriation expenses. The certification required under this procedure was given to the complainant. While still on leave, extended because of illness, the complainant received a letter dated October 13, 1953, in which the Chief of Personnel informed her of the termination of her appointment as a result of reduction in staff. This letter stated:

> " As you may have been aware prior to your departure on home leave the curtailment of funds available for 1954 has necessitated a reduction in staff. The division directors have made a careful survey of all their staff members and, in effecting their reduction in staff, they have retained those who they consider make the greatest contribution to their work programmes. Taking all factors into consideration, the Director of the Economics Division has, with regret, decided that it will be necessary to terminate your services on 31 December 1953; this letter, therefore, will serve as official notice of your separation at the end of this year."

Having returned from leave on November 3, 1953, the complainant was assigned to a temporary post at the seventh Session of the F.A.O. Conference which was meeting at the time but, the Secretary-General of the Conference having indicated that her work was not of the standard required, she returned to the division to which she was previously attached. On December 23, 1953, after various interventions, the complainant appealed against the termination decision of which she had been notified on October 13 to the internal Appeals Committee provided for in the Staff Regulations. The complainant's grievances were (i) that the post she held had not been abolished but had, in fact, been occupied by a new recruit to the staff, and (ii) that there existed concrete proof of her satisfactory services, namely, the award of two successive annual increments and the certification given before she proceeded on home leave. On December 31, 1953, the Director-General informed the complainant that as her appeal had not been submitted within the required time limit, it was not receivable. Subsequently, however, the Director-General revoked this decision and the complainant was advised by a letter dated February 12, 1954, that her complaint would be submitted to the Appeals Committee. In the course of the procedure which preceded the adoption of the conclusions of the Appeals Committee, it was clearly established that the reduction in staff given as the reason for terminating the Complainant's appointment was the result of a curtailment of funds for the Expanded Technical Assistance Programme of F.A.O., which was financed through voluntary contributions of States. At the end of September 1953, it had become apparent that several posts of shorthand-typists included in this programme had to be abolished. As a result of this curtailment of funds, one of the shorthand-typists attached to the division to which the complainant belonged had to be dismissed. Although she held a permanent contract and belonged to the regular staff, the Director of the division concerned designated the complainant for this purpose, as being the person whose services, in his opinion, contributed least to the work of the division. This termination was to make it possible to retain in the service of the division an official of equal grade who had until then held a temporary post at the headquarters of the Organization under the Expanded Technical Assistance Programme but whose services were considered, for the same work, more useful than those of the complainant. The Appeals Committee, by a majority decision, came to the following conclusion:

> "While recognising the importance of the concept that holders of permanent appointments are entitled to a preferential treatment on the occasion of a reduction in force, the majority of the Committee satisfied itself that an exception under the policy in Staff Rule 302.9012 was fairly made in the case of Miss Tranter and that this decision was only reached after a careful review of the performance of all the stenographers of the Economic Division."

A copy of this recommendation was communicated to the complainant by a letter dated May, 13, 1954, in which the Director-General informed her that he had decided to abide by the opinion of the Appeals Committee. In the meantime, in February 1954, when the appointment of the complainant was already terminated, the post which she had occupied fell vacant, the official who had been given preference over her having been called upon to occupy a more important post. A competition was opened with a view to filling the post formerly occupied by the complainant, there being no provision granting a right of preference under the terms of which she could reoccupy that post in her capacity as an ex-official. The complainant then lodged a complaint with the Administrative Tribunal, seeking the rescission of the decision to terminate her appointment.

The following main contentions were advanced by the complainant:

I. The decision appealed against was null and void since it was based on a fictitious reduction of staff effected in violation of Articles IV and IX of the Staff Regulations.

(a) No reduction of staff in fact took place; on the contrary, the number of posts in the grade to which the complainant belonged which were provided for in the regular budget of the Organization was increased. The official budget estimates for 1954 provided that the number of posts in the grade of the complainant was to be increased from 109 to 117 in the course of 1954. While, as a result of a global reduction in the relevant budgetary credit, the Director-General was given discretion to amend his original estimates, the revised estimates provided for an increase of eight units in the grade of the Complainant. A reduction in the number of posts could not validly be anticipated since the Director-General requested 20 additional posts, and, even after the Conference had scaled down his original proposals, eight additional posts were provided for. Furthermore, when the complainant proceeded on home leave, it had been certified that her services would be required after her return to duty.

(b) A curtailment of the funds available for the purposes of the Expanded Technical Assistance Programme was without effect on the regular establishment of F.A.O. It was beyond dispute that the appointment of the complainant had been terminated as a result of curtailment of funds for the Technical Assistance Programme. Thus the complainant's appointment had been terminated in order to retain within the regular establishment of F.A.O. a temporary official appointed for the purposes of the Technical Assistance Programme. However, technical assistance staff did not belong to the regular establishment of F.A.O., and any reduction of staff thus effected should be confined to technical assistance staff. The Expanded Programme of Technical Assistance provided for in Resolution

222A (IX), adopted by the Economic and Social Council and approved by the General Assembly of the United Nations, was to be clearly distinguished from the activities of F.A.O. carried out in accordance with the provisions of the F.A.O. Constitution and financed through the regular budget of F.A.O., because the Technical Assistance Programme was (i) financed through voluntary contributions of a group of States which were not necessarily Members of F.A.O., (ii) controlled by central organs common to but distinct from those of the international organizations participating in the programme, (iii) fulfilling aims different from those of the normal programme of the organizations participating in it, and (iv) not subject to the financial control of the constitutional authorities of participating organizations. In lumping together all the employees of F.A.O. without distinction as to whether they were appointed to posts provided for in the regular establishment or to posts specially created for the purposes of the Technical Assistance Programmes and financed through that programme, the defendant not only ignored the constitutional distinction between the two establishments, but also violated a specific provision of Resolution 222A (IX) of the Economic and Social Council of the United Nations which governed the entire programme, in that paragraph 7 of the Resolution stated that technical assistance funds should be used exclusively for the purposes of the programme.

(c) A distinction should be made between the rules governing conditions of employment of officials of the regular establishment and those of officials appointed for the purposes of the Technical Assistance Programme. The relevant provision of the Technical Assistance Programme Administrative Memorandum No. 5 conferred upon officials appointed to the regular establishment who had been transferred to the Technical Assistance Programme re-employment rights within the regular establishment should their employment come to an end for the purposes of the Technical Assistance Programme. *A contrario*, officials appointed solely for the purposes of the Technical Assistance Programme enjoyed no such re-employment rights, and the complainant's rights to security of tenure had thus been violated, since a temporary technical assistance programme employee, who enjoyed even less right to re-employment within the regular establishment than permanent officials of the regular establishment transferred to the Technical Assistance Programme, had been retained in preference to the complainant who had been appointed to the regular establishment and had never ceased to belong to it. Furthermore, Article 201 of the Personnel Manual issued by the Technical Assistance Board provided that the staff members appointed to continuing posts on long-term contracts should be subject to conditions of employment applicable to the permanent staff of organizations participating in the Technical Assistance Programme, except that such staff members should enjoy no seniority or re-employment rights outside the Technical Assistance Programme.

(d) Subsidiarily, section 302.9012 of the Staff Rules of F.A.O. provided that, as a general rule, officials holding permanent contracts should be retained in service, in case of reduction of staff, in preference to all other officials holding different types of appointment. It was for the defendant to prove that an exception should be made to the general rule. There could be no question that, on the occasion of each change in the size of the budget, open competition should take place between permanent and temporary officials for retention in service, as such a system would result in depriving of all substance the very notion of permanent officials who, by the nature of their appointment, enjoyed a measure of protection against, and preferential treatment in case of, budgetary fluctuations involving reduction of staff. Even if such a method were to be countenanced, the complainant benefited from a presumption of competence resulting from the continuation of her temporary employment after a three months' trial period, the grant of a five-years' appointment, the subsequent grant of a permanent appointment, and the award of two successive salary increments for satisfactory services.

II. Alternatively, the decision appealed against was null and void because it proceeded from a misuse of power.

(a) The reduction of staff invoked by the defendant to justify the termination of the complainant's appointment was not the true reason for her dismissal. A letter of January 22, 1954, addressed to the complainant by the Chief of Personnel in connection with a letter which the complainant had addressed to the Director-General, but which had been intercepted by the Chief of Personnel, stated that

> " . . . whilst the reasons given [for the termination] were perfectly proper and correct it was the view of the Director of Economics Division that this form should be used in dealing with a difficult situation in as kindly a way as possible. Reports of your performance and behaviour warrant dismissal for unsatisfactory services. If your letter of 8 January addressed to the Director-General is, in fact, forwarded to him, and if, as a result of it, he changes his mind and allows your appeal to go forward to the Appeals Committee, then the fact of your unsatisfactory service is bound to emerge in evidence before that Committee. This evidence would then form part of your personnel record upon which answers to any future character enquiries would be based."

This statement, and the implied threat, established that the defendant intended to terminate the complainant's appointment for alleged unsatisfactory services, and used an alleged reduction of staff in order to justify that termination. This constituted a misuse of power.

(b) While the very fact that there had been a misuse of power, in that the true reason of the termination was not the one which had been stated, would, in itself, justify the rescission of the decision complained of, this misuse of power had caused the complainant a further injury in that, since the appointment was terminated for reduction of staff, neither the Director of Administration, nor the Appeals Committee, nor the Director-General himself had ever considered the qualifications and work of the complainant on their merits. Only an evaluation of relative qualifications and performance, compared with that of other officials, had taken place, on the assumption that in case of reduction in staff better qualified officials should be retained in preference to less qualified officials. If the true reason for the termination was the unsatisfactory character of the complainant's services, the defendant, in order to justify such a decision, should have had to establish that the complainant's services were unsatisfactory in absolute terms, which was not done, and could not be done since (i) the complainant's competence was proved by virtue of the administrative decisions which resulted in her retention in service after a three months' trial period, the grant of a five-years' appointment, the grant of a permanent contract, and the award of two successive salary increments, and (ii) it would have been necessary, in order to prove unsatisfactory services, to rely on the annual reports on the complainant, which were presumed *juris et de jure* to be favourable since they led to the award of annual increments in accordance with section 301.132 of the Staff Regulations and which, in the alternative, were null and void since they had never been communicated to the complainant, in violation of section 303.26 of the Staff Regulations.

In reply, the following main contentions were advanced on behalf of the Director-General of F.A.O.:

(a) Under the rules specifically applicable to F.A.O. staff no distinction should be made between officials appointed for the purposes of the regular budget and officials appointed for the purposes of the Technical Assistance Programme. As the former enjoyed no greater rights than the latter, a curtailment of technical assistance funds involving reduction of staff affected both categories of officials equally, and officials appointed for the purposes of the regular budget enjoyed no preferential rights over officials appointed for the purposes of the Technical Assistance Programme.

(b) While permanent officials should, as a general rule, be retained in service, in case of reduction of staff, in preference to temporary employees, the rule admitted of exceptions, and an exception had been fairly made since, in the opinion of the Director-General (which was not subject to judicial review) the Complainant was less competent than the temporary official who had been retained in preference to her.

Held: that the complaint must be dismissed. As regards the validity of the termination, as a result of the curtailment of funds available for the purposes of the Expanded Technical Assistance Programme, of the appointment of officials appointed to the regular establishment, provisions applicable to the defendant Organization covered the whole of its personnel, both that of the regular staff and that of the Expanded Technical Assistance Programme, and no distinction should therefore be made between officials appointed for either purpose. On the other hand, permanent officials as a general rule enjoyed preference over temporary officials for the purposes of retention in service in case of reduction of staff. Exceptions could be made, in the discretion of the Director-General, provided there was no misuse of power, and in the present case it was not demonstrated that there was in fact misuse of power. The Director-General's decision was questionable in equity, but the Tribunal was bound to observe strictly the rules of law and could have recourse to equity only in the event of lack of clarity of the text or silence of the regulations. In the present case the complainant had not sufficiently demonstrated that any statutory provision had been violated.

The Tribunal said: "Article IX (paragraph 301.091) of the Staff Regulations of the defendant Organisation provides that the Director-General may terminate the appointment of a staff member who holds a permanent appointment if the necessities of the service require reduction of staff . . . Paragraph 302.9012 of the Staff Rules provides that, when the necessities of the service require reduction of staff, staff members with permanent appointments shall, as a general rule, be retained in preference to those holding other appointments, subject to the availability of suitable posts in which their services can be effectively utilised; however, due regard shall be given to relative competence, integrity and length of service of the persons concerned . . . Section 310.54 of the Administrative Manual provides that a staff member may be separated at any time during the period of an appointment of any type if the work programme of the Organisation requires a re-grouping or curtailment of functions resulting in a reduction in force in one or more occupational groups; that the execution of the revised work programme may call for a reduction in force under which a number of staff members are considered for retention in a reduced number of posts; that efforts are made to utilise elsewhere staff members involved in a reduction in force and due consideration is given to efficiency and other pertinent factors in determining which staff members' services are to be considered redundant.

"The defendant Organisation maintains that its personnel—both that of the regular staff and that of the Expanded Technical Assistance Programme—forms a whole and that a curtailment of the said programme cannot be considered separately. The Complainant submits, on the contrary; (a) that by the term 'reduction of staff', within the meaning of Article IX of the Staff Regulations, must be understood reduction of the staff covered by the constitutional budgetary provisions of the defendant Organisation and that the regular staff of the said Organisation must not be confused with the technical assistance staff which is governed by distinct rules and paid out of special funds; (b) that the technical assistance funds are moreover outside the budgetary control of the participating organisations and are ' exclusively for the Expanded Technical Assistance Programme ' (Resolution 222A (IX) of the Economic and Social Council).

" However, various provisions peculiar to the defendant Organisation cover the whole of its personnel, both that of the regular staff and that of the Expanded Technical Assistance Programme. . . . For example, administrative memorandum No. 5 of the Expanded Technical Assistance Programme of the defendant Organisation provides, in paragraph 4, that the general conditions of employment applicable to the regular staff, as set out in the Administrative Manual and administrative memoranda of the Organisation apply to incumbents of headquarters and regional office posts charged to the Expanded Programme of Technical Assistance.

" [Moveover,] the Complainant, in support of her arguments, has maintained that the Personnel Manual established by the Technical Assistance Board provided, in Article 201, paragraph 3, that personnel appointed to continuing posts on full-term appointments would be governed by the basic conditions of service applied by the participating organisations to their regular staff provided that no seniority or other re-employment rights outside the Technical Assistance Programme should be applied to such personnel; but the same Article 201 provides, in its first paragraph, that its scope is limited to ' project personnel ', that is to say to technical assistance personnel on mission under a specific technical assistance project and not to technical assistance staff attached to the headquarters of the Organisation. Therefore, . . . in any case it appears that the reduction in technical assistance staff at the headquarters of the Organisation must legitimately be taken into consideration as affecting the whole staff, as has been done by the defendant Organisation.

" If a comparison is drawn between the number of posts identical to that which the defendant occupied (that is to say grade G.4, non-local) on the regular staff and the technical assistance staff, there was in 1954 a net reduction of fifteen posts as compared with 1953, eight new posts having been established on the regular staff and twenty-three having been abolished out of the total number of posts under the Expanded Technical Assistance Programme, exclusive of the posts charged to ' field expenses ' (Budget for the year 1954 approved by the Conference of the Food and Agriculture Organisation of the United Nations at its Seventh Session (November–December 1953, p. 35). In consequence the defendant Organisation was justified in invoking reduction of staff (within the meaning of Article IX (paragraph 301.091) of the Staff Regulations.

" [While] it is true that, as a general rule, in the event of reduction of staff, officials holding a permanent appointment must be retained, in preference to officials holding other appointments, the defendant Organisation has nevertheless considered itself authorised to have recourse, in this case, to the exception to this rule by invoking the lesser competence of a permanent official in relation to that of a temporary official. There is no doubt that as regards the comparative evaluation of services to judge this competence, the Director-General of the defendant Organisation has discretionary power. But this discretionary power cannot be used to misuse recourse to the aforementioned exception.

"As the Complainant has pointed out, it would be extremely regrettable to establish, on the occasion of every fluctuation in the budget of the Expanded Technical Assistance Programme a competition on merit between permanent officials of the regular staff and temporary officials of the above-mentioned programme. . . . this systematic recourse to the statutory exception would be contrary to the spirit of the provisions governing the conditions of service of permanent officials who must in principle be protected against these fluctuations, and would thus lead to rendering the notion of permanency of function void of substance; [and] such a procedure would impede good administration and endanger the sound functioning of the international organisations.

" . . . In equity it is undoubtedly permissible to regret that the Director-General of the defendant Organisation—while maintaining that he endeavoured, but in vain, to transfer the Complainant to a new post—finally applied to her the statutory exception, more particularly since the Complainant's post became vacant a few weeks after the date on which her contract had ended and could have been reoccupied by her if the decisive measures taken in regard to her had been deferred somewhat; —the Conference having fixed the budget for 1954 in November and there being thereafter no obstacle in the way of providing for appointments to the posts to be established in consequence for that year—the Tribunal judges singularly fragile the argument of the defendant Organisation that, in any event, it was not possible to envisage filling the posts provided for under the said budget at the time when the decision to separate the Complainant was taken (October 1953); at the time when the Conference fixed the budget for 1954, the period of notice given to the Complainant was still running; the only circumstance which the defendant Organisation can invoke is that, on balance, there was in effect a reduction in the total number of posts as has been set forth above. However, it is not demonstrated that there was in effect misuse of the exception, and cognisance should be taken of the opinion given on this point by the Appeals Committee.

The Tribunal is not invested with the power to judge the professional reasons which led the Director-General to make an exception to the principle in giving preference to a temporary official rather than to a permanent official in this circumstance. In strict law the complaint cannot be received as it is not sufficiently demonstrated that any statutory provision has been violated. . . . The judge is bound to observe strictly the rules of law and can have recourse to equity only in the event of lack of clarity of the text or silence of the regulations. This being so, the judge can only express the hope that the conditions in which recourse may be had to the exception be specified in such a manner that the stability promised to permanent officials cannot become a dead letter in practice.

"The Tribunal . . . declares the complaint receivable but unfounded."

[Report: International Labour Office, *Official Bulletin*, Vol. XXXVII, No. 7, p. 279.]

United Nations—Officials of—Administrative Tribunal of the United Nations—Awards of—Whether Binding upon General Assembly.

See p. 310 (*Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*).

F.—MISCELLANEOUS

International Organizations—Immunity from Local Jurisdiction —Action Relating to Land Owned by International Organization.

See p. 279 (*Procureur Général of the Court of Cassation* v. *Syndicate of Co-Owners of the Alfred Dehodencq Property Company*).

PART X

DISPUTES

B—INTERNATIONAL COURT OF JUSTICE

II.—Contentious Jurisdiction

i.—Competence

International Court of Justice—Competence of—Assumption of Jurisdiction in respect of International Responsibility of a State not a Party to the Proceedings—Raising of Issue of Jurisdiction by a State Instituting Proceedings.

MONETARY GOLD CASE.
(Preliminary Objection.)
International Court of Justice.

(Vice-President Guerrero, Acting President; President Sir Arnold McNair, Basdevant, Hackworth, Winiarski, Zoričić, Klaestad, Badawi, Read, Hsu Mo, Levi Carneiro, Armand-Ugon, Kojevnikov, Judges; Morelli, Judge *ad hoc.*)

Judgment of June 15, 1954.

THE FACTS (as stated by the Court).—" The origin of the present case is to be found in Part III of the Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold, signed at Paris on January 14th, 1946. Part III, in its single Article, contains provisions relating to the restitution of monetary gold found in Germany or in third countries. In accordance with these provisions, all such monetary gold 'shall be pooled for distribution as restitution' among the countries which can establish that a definite amount of monetary gold belonging to them 'was looted by Germany or, at any time after 12th March, 1938, was wrongfully removed into German territory'. The French Republic, the United Kingdom and the United States of America, as well as Albania and other States, are signatories of the Paris Agreement; Italy adhered to the provisions of Part III of the Agreement by a Protocol signed at London on December 16th, 1947.

" The implementation of the provisions of Part III of the Paris Agreement having been entrusted to the Governments of the French Republic, the United Kingdom and the United States of America, these Governments appointed a Tripartite Commission to assist them in the distribution of the pool of monetary gold. One problem, however, that of the gold of the National Bank of Albania, removed from Rome in 1943 and claimed on the basis of Part III of the Paris

Agreement by Albania, on the one hand, and by Italy on the other, involved ‘ disputed questions of law and fact ’ which neither the Tripartite Commission nor the three Governments were in a position to resolve. In these circumstances, the three Governments signed on April 25th, 1951, the Washington Agreement, by which they decided to submit to an arbitrator for his opinion the question whether the gold belonged to Albania or to Italy or to neither.

“ On February 20th, 1953, in reply to the only question submitted to him, the Arbitrator gave his opinion that the gold in question belonged in 1943 to Albania, within the meaning of Part III of the Paris Agreement.

“ The three Governments signatories of the Washington Agreement of April 25th, 1951, had accompanied it by a Statement of the same date in which they declared that if the finding of the Arbitrator should be in favour of Albania, ‘ the three Powers are confronted by another question ’, since Italy and the United Kingdom claimed the gold for different reasons not covered by Part III of the Paris Agreement. With regard to this question, the three Governments took a decision which is at the root of the present case. They agreed that, if the opinion of the Arbitrator should be that Albania had ‘ established a claim under Part III of the Act ’ to the gold in question, ‘they will deliver the gold to the United Kingdom in partial satisfaction of the judgment in the Corfu Channel case unless within 90 days from the date of the communication of the Arbitrator’s opinion to Italy and Albania ’ either of the following two conditions should be fulfilled: either Albania made an application to the Court for the determination of the question whether it was proper that the gold should be delivered to the United Kingdom; or Italy made an application to the Court for the determination of the questions whether by reason of any rights which she claimed to possess as a result of the Albanian law of January 13th, 1945, or under the provisions of the Italian Peace Treaty, the gold should be delivered to Italy rather than to Albania and whether the claim of the United Kingdom or of Italy to receive the gold should have priority, if this issue should arise. The three Governments accepted as respondents the jurisdiction of the Court for the purpose of the determination of such applications by Italy or by Albania or by both, and undertook to conform with any decisions of the Court.

“ Albania, which has not accepted the jurisdiction of the Court, refrained from making any application to it. Italy, in accordance with the Statement and within the prescribed time-limit, submitted an Application to the Court in which she formulated two claims with regard to the gold, but, instead of presenting a Memorial on the merits within the time-limit fixed for that purpose by the Court, she raised an issue as to the Court’s jurisdiction to deal with the first claim in her Application. The question of the jurisdiction of the Court was first raised in the form of a ‘ preliminary question ’.

" As a result of the Order of November 3rd, 1953, the Italian Government submitted a written Statement on the Preliminary Question in which it put forward a Submission which was repeated at the end of its oral reply as its first final Submission; in this Submission the Court is asked to adjudge and declare that the Washington Statement ' is not a sufficient basis upon which to found the jurisdiction of the Court to deal with the merits of the claim set forth under No. 1 of the Submissions of the Application '; the ground on which Italy's Submission is based is that the proceedings contemplated by the Washington Statement and instituted by Italy in conformity with the Statement are in reality directed against Albania, which is not a party to the suit."

In its second submission Italy asked the Court to declare that " Italy's right to receive the said monetary gold must have priority over the claim of the United Kingdom to receive gold in partial satisfaction of the judgment in the *Corfu Channel* case."

Held (unanimously): that the jurisdiction conferred upon the Court by the common agreement of France, the United Kingdom, the United States of America and Italy does not, in the absence of the consent of Albania, authorize it to adjudicate upon the first submission in the Application of the Italian Government;

(By thirteen votes to one): that the Court cannot adjudicate upon the second Submission in the Application of the Italian Government.

The Court said:

[I. *Raising of the Issue of the Jurisdiction of the Court by the State Instituting the Proceedings.*]—" At the present stage of the case the Court must adjudicate upon the validity of this Submission presented by Italy; certain special features of the proceedings, however, make necessary a preliminary examination of the questions raised by the Submissions of the United Kingdom.

" Of the three respondent Governments, the Governments of the French Republic and of the United States of America, without going beyond certain general observations with regard to the solution of the questions now before the Court, expressed a desire that the Court should decide the merits of the case which had been referred to it.

" As regards the United Kingdom Government, it saw in the challenge to the Court's jurisdiction made by Italy a ground for questioning the validity of the Application. Its main Submissions seek a declaration by the Court that

' (1) in view of Italy's objection on the ground of the alleged lack of competence of the Court, her Application to the Court of May 19th, 1953,

(*a*) does not conform to the conditions and intentions of the Tripartite Washington Statement of April 25th, 1951, or

alternatively

(*b*) has been in effect withdrawn or cancelled by Italy, and is therefore invalid and void;

(2) Italy is, in the circumstances, to be deemed not to have made any application to the Court within the meaning and for the purposes of the Tripartite Washington Statement.'

" With these Submissions of the United Kingdom there should be contrasted the last Italian Submission formulated by Counsel for the Italian Government at the hearing on May 13th, 1954:

'That the Court, whatever may be its decision on the question of jurisdiction referred to above, is without jurisdiction to adjudicate upon the claims contained in No. 1 and No. 2 of the Submissions of the Government of the United Kingdom, dated March 26th, 1954.'

" In its Observations and Submissions on the Preliminary Question, the United Kingdom Government asked the Court to find that, in view of the Preliminary Objection raised by the Italian Government, the Application did not conform or no longer conformed to the conditions and intentions of the Washington Statement; that there was no longer any Application before the Court and that Italy must be considered as not having made an Application, in accordance with the conditions laid down by the Statement. The second Submission was explicit:

'(2) That, in consequence, the United Kingdom is entitled by the Tripartite Washington Statement to receive a transfer of the gold in the same manner as if Italy, as well as Albania, had not applied to the Court under the relevant provisions of the Statement.'

This Submission threw light upon the intention of the previous Submission; but it was not reproduced in the final Submissions, and the Court is consequently not called upon to deal with it.

" There remain, however, the United Kingdom's final Submissions (1) and (2), of which the wording has been modified in relation to the Submissions of the United Kingdom as stated in its written Observations, though the sense and scope remain unchanged; it is therefore reasonable to assume that the third Italian final Submission applies to the altered Submissions of the United Kingdom.

" The Italian Government contends that the Court has no jurisdiction to adjudicate upon these Submissions of the United Kingdom. The Court cannot consider itself as lacking jurisdiction to adjudicate upon the validity, withdrawal or cancellation of an application which has been submitted to it: to adjudicate upon such questions with a view to deciding upon the effect to be given to the Application falls within the purview of its judicial task.

" It is indeed unusual that a State which has submitted a claim by the filing of an Application should subsequently challenge the jurisdiction of the Court to which of its own accord it has applied. In the present case it is Italy which, after having seised the Court, has raised an issue as to the Court's jurisdiction. This is, however, to be understood in the light of the circumstances of the case. The three Governments which signed the Washington Statement made a collective offer in respect of the present proceedings, and Italy accepted that offer. It was in that Statement that the subject-matter of the suit was pre-determined and it was in the same Statement that the three Governments accepted as defendants the jurisdiction of the Court. In these circumstances, Italy, after having taken the inital step, felt some doubt as to whether the subject-matter of the dispute was such that the Court could deal with it. She finally raised the issue in the form of a genuine Preliminary Objection.

" Article 62 of the Rules is couched in terms which do not limit to the Respondent the right to present preliminary objections. This Article does not preclude the raising of a Preliminary Objection by an Applicant in circumstances such as those in which the present case has arisen. The Preliminary Objection of Italy is therefore not contrary to the Rules or to the Statute.

" The United Kingdom contends that in consequence of Italy's objection to the jurisdiction of the Court, her Application does not conform to the conditions and intentions of the Washington Statement. In support of this contention, the Agent of the United Kingdom Government advanced certain arguments: First, the unequivocal acceptance of the Court's jurisdiction by Italy is one of the conditions in the Washington Statement; in view of her preliminary objection, her acceptance of jurisdiction could not be considered as unequivocal. Second, another condition in the Washington Statement is that Italy could only make an application for the determination of certain questions; but Italy is now suggesting that the Court should not determine those questions. Third, under the Washington Statement, Italy's Application should be a real one; it is not real because of her objection to jurisdiction.

" The Court finds that Italy's acceptance of jursidiction is one thing, while her raising of a legal issue on jurisdiction is quite another. It cannot be inferred from the making of the Preliminary Objection that Italy's acceptance of jurisdiction has become less complete or less positive than was contemplated in the Washington Statement. She continues to hold herself out as being subject to the Court's jurisdiction in these proceedings after the raising of the Preliminary Objection as much as she did before taking that step. The same considerations apply to her request for the determination of the questions submitted in her Application. She has requested the Court to settle the problem of jurisdiction before determining those questions. This does not mean that she is asking the Court not to determine those questions under any circumstances. As to the real character of Italy's Application, the Court has only to observe that her Application, once properly deposited, must be considered as real and as remaining real unless it is formally withdrawn.

" Consequently, the Court cannot accept the contention of the United Kingdom regarding non-conformity of the Application with the conditions and intentions of the Washington Statement.

" Nor can the Court accept the contention in final Submission No. 1 (*b*) of the United Kingdom that the Application has been in effect withdrawn or cancelled by Italy. Article 69 of the Rules deals with the case where, in the course of proceedings instituted by an Application, the Applicant informs the Court in writing that it is not going on with the proceedings; in this event the provisions of Article 69 apply. The raising of the Preliminary Question by Italy cannot be regarded as equivalent to a discontinuance.

" As to the Submission that the Italian Application should be held to be ' invalid and void ', it is enough to state that the Application, if not invalid at the time when it was filed, cannot subsequently have become invalid by reason of the preliminary question which Italy raised with regard to the Court's jurisdiction in this case.

" The Court accordingly finds that it has been validly seised of the Application and that this Application, contrary to the submissions of the United Kingdom Government, still subsists. Therefore, the Court must now proceed to consideration of the Preliminary Objection of Italy in order to decide whether it can adjudicate upon the merits of the claims set forth in the Application."

[II. *Jurisdiction in respect of a State which is Not a Party to Proceedings.*] " The Preliminary Objection raised by Italy assumes precise form in the main Submission by which the Court is asked

' To adjudge and declare:

' That the Statement to accompany publication of the Agreement between the Governments of the French Republic, the United Kingdom of Great Britain and Northern Ireland and the United States of America for the submission to an arbitrator of certain claims with respect to gold looted by the Germans from Rome in 1943 is not a sufficient basis upon which to found the jurisdiction of the Court to deal with the merits of the claim set forth under No. 1 of the Submissions of the Application submitted to the Court by the Government of the Italian Republic on May 19th, 1953;

' That the Court is consequently without jurisdiction to adjudicate upon the merits of the said claim.'

" On the other hand, the United Kingdom Government, in its alternative Submission, asks the Court to adjudge and declare

' that, if the Court holds, contrary to the contentions of the United Kingdom, that the Italian Application is still valid and subsisting, the Court has jurisdiction to determine on their merits the questions put to the Court in the Italian Application '.

" The Italian Government, in making its Application, stated that it was relying on the provisions of paragraph (*b*) of the Washington Statement. The subject-matter of the suit is the same as that defined in the Statement. The Parties against whom the suit was brought, namely France, the United Kingdom and the United States of America, are those who have declared that they accept the jurisdiction of the Court for the purpose of the determination of Italy's Application. The three States have not named any other Party in the Statement ' for the determination of the question ' relating to Italy's claim to the delivery of the gold. The Court notes therefore that in respect of the relations between these three States and Italy the Application is in conformity with the offer made in the Washington Statement.

" The Governments of France, the United Kingdom and the United States of America, and the Government of Italy, by their separate and successive acts—the adoption of the Washington Statement, in the one case, and in the other case, the deposit on May 19th, 1953, of the Declaration of acceptance of the jurisdiction of the Court and the filing of the Application—have referred a case to the Court within the meaning of Article 36 (1) of its Statute. They have thus conferred jurisdiction on the Court to deal with the questions submitted in the Application of the Italian Government.

" The Court must, however, examine whether this jurisdiction is co-extensive with the task entrusted to it. The Agent of the United Kingdom Government stated during the oral proceedings that:

> ' Albania's consent is not, in our view, necessary to the determination of the questions affecting Italy under head (*b*) of the Washington Statement, because the only issue raised under that head—a decision on which by the Court would be binding on the Parties to it—is the question of whether Albania's share should go to the United Kingdom or to Italy; and both those countries, as well as the two remaining Washington Governments, have given their consent and are before the Court.'

This seems to be an over-simplification of the problem with which the Court is confronted. The Court is not merely called upon to say whether the gold should be delivered to Italy or to the United Kingdom. It is requested to determine first certain legal questions upon the solution of which depends the delivery of the gold.

" By the first claim in the Application the Court is requested to decide that the three respondent States ' should deliver to Italy any share of the monetary gold that might be due to Albania under Part III of the Paris Act of January 14th, 1946, in partial satisfaction for the damage caused to Italy by the Albanian law of January 13th 1945 '. The Washington Statement specified in advance one of the purposes of Italy's Application, namely, the ' determination of the question whether, by reason of any right which she claims to possess as a result of the Albanian law of 13th January, 1945, or under the provisions of the Italian Peace Treaty, the gold should be delivered to Italy rather than to Albania '. The Court will not deal with the Italian Peace Treaty since its provisions have not been invoked during the present proceedings.

" The first Submission in the Application centres around a claim by Italy against Albania, a claim to indemnification for an alleged wrong. Italy believes that she possesses a right against Albania for the redress of an international wrong which, according to Italy, Albania has committed against her. In order, therefore, to determine whether Italy is entitled to receive the gold, it is necessary to determine whether Albania has committed any international wrong against Italy, and whether she is under an obligation to pay compensation to her; and, if so, to determine also the amount of compensation. In order to decide such questions, it is necessary to determine whether the Albanian law of January 13th, 1945, was contrary to international law. In the determination of these questions—questions which relate to the lawful or unlawful character of certain actions of Albania vis-à-vis Italy—only two States, Italy and Albania, are directly interested. To go into the merits of such questions would be to decide a dispute between Italy and Albania.

" The Court cannot decide such a dispute without the consent of Albania. But it is not contended by any Party that Albania has given her consent in this case either expressly or by implication. To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent.

" It has been suggested that Albania might have intervened. The provisions of Article 62 of the Statute give to a third State, which considers that it ' has an interest of a legal nature which may be affected by the decision in the case ', the right to request permission to intervene. It has been contended that the inclusion of the provisions for intervention indicate that the Statute contemplates that proceedings may continue, notwithstanding that a third State may have an interest of a legal nature which might enable it to intervene. It is argued that the fact that a third State, in this case Albania, may not choose to intervene should not make it impossible for the Court to give judgment on rights as between the Parties.

" Albania has not submitted a request to the Court to be permitted to intervene. In the present case, Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania.

" It is also contended that any decision of the Court on the questions submitted by Italy in her Application will be binding only upon Italy and the three respondent States, and not upon Albania. It is true that, under Article 59 of the Statute, the decision of the Court in a given case only binds the parties to it and in respect of that particular case. This rule, however, rests on the assumption that the Court is at least able to render a binding decision. Where, as in the present case, the vital issue to be settled concerns the international responsibility of a third State, the Court cannot, without the consent of that third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it.

" The Court accordingly finds that, although Italy and the three respondent States have conferred jurisdiction upon the Court, it cannot exercise this jurisdiction to adjudicate on the first claim submitted by Italy.

" The Court will now consider whether it can adjudicate upon the second claim in the Italian Application. This claim, which is also based on the Washington Statement, is that ' Italy's right to receive the said share of monetary gold must have priority over the claim of the United Kingdom to receive the gold in partial satisfaction of the Judgment in the Corfu Channel case '.

" It might seem that the second claim, unlike the first, only concerns Italy and the United Kingdom, both of whom have already accepted the jurisdiction of the Court. According to the Washington Statement, however, the question of priority between the claim of Italy and that of the United Kingdom will only arise when it has been decided that, as between Italy and Albania, the gold should go to Italy. For the words ' if this issue [the issue of priority] should arise ' used in the Statement could only mean that the issue of priority would call for a decision only if the Court had already decided that Italy had a valid claim to the gold in question against Albania, thus creating, in the minds of the three Governments, a competitive claim with the claim of the United Kingdom.

" The dependence of the second claim upon the first is confirmed by the Italian Submission itself. When the Italian Government speaks of ' Italy's right to receive the said share of monetary gold ', it is not referring to any hypothetical right: it must be referring to a right which it believes it possesses and which, by the first Submission in its Application, it requests the Court to uphold.

" This dependence is further borne out by the statements made by the Parties in the course of the written and oral proceedings. In the document deposited on October 30th, 1953, in which the Italian Government raised the Preliminary Question, it is stated that the second question submitted in its Application will only arise in the event that the Court has decided on the merits of the first question, as requested by the Italian Government. The United Kingdom Government, in its Observations and Submissions on the Preliminary Question, also said that the priority issue could only arise if the Court went into the question of Italy's claim against Albania, and decided that in favour of Italy. At the hearings, Counsel for the Italian Government and the Agent of the United Kingdom Government both spoke in a similar vein.

" Counsel for the Italian Government added, however, that ' if the Court considers that the question of priority between the respective rights of the United Kingdom and Italy can be examined in a hypothetical form, independently of the examination of the first Italian claim, the Italian Government, for its part, would have no objection '. Apart from the fact that this statement, which is conditional in form, can hardly be construed as a formal request for consideration by the Court of the second claim on a hypothetical basis, it would, in any event, constitute a new proposition which is not based on the Washington Statement and to which the respondent States have not expressed agreement. It is evident that the Court could not act upon such a proposition.

" The Court accordingly finds that inasmuch as it cannot adjudicate on the first Italian claim, it must refrain from examining the question of priority between the claim of Italy and that of the United Kingdom."

[Report: *I.C.J. Reports*, 1954, p. 19.]

Sir Arnold McNair, President, after voting for the Judgment, made the following declaration:

" I concur in the finding of the Court that it is unable to adjudicate upon the two questions submitted to it by the Application of the Italian Government, but the reasons which have led me to this conclusion are different from those stated in the Judgment of the Court. In my opinion, there is a fundamental defect in the Application and in the constitution of these proceedings. The Court is asked to adjudicate upon an Italian claim against Albania arising out of an Albanian law of January 13th, 1945. Albania is therefore an essential respondent. But these proceedings are not brought against Albania, nor does the Application name Albania as a respondent, although there is nothing in the Washington Statement which could preclude the Italian Government from making Albania a respondent. I cannot see how State A, desiring the Court to adjudicate upon its claim against State B, can validly seise the Court of that claim unless it makes State B a respondent to the proceedings—however many other States may be respondents."

In an Individual Opinion Judge Read said as follows:

" In this case, while I am in agreement with the operative provisions of the Judgment and, in general, with the reasoning by which they are justified, I am unable to concur in one finding which has been made by the Court. This is a finding that in the relation between the respondent States and Italy, the Application is in conformity with the offer to submit to the jurisdiction of the Court contained in the Washington Statement.

" While there can be no doubt that the Court is competent to deal with this question, I do not think that it should be decided at this stage.

" To begin with, it is unnecessary to make this finding in order to justify the operative judgment of the Court.

" There is, however, a much more compelling reason for not deciding the point at this stage. It is not dealt with in the final submissions of the Parties and none of the Parties has requested a finding on this point. Further, it has not been fully argued during the written or oral proceedings.

I am bound by the principle of international law which was adopted by this Court—in the *Ambatielos* case (jurisdiction), I.C.J. Reports 1952, p. 45—and stated as follows:

> ' The point raised here has not yet been fully argued by the Parties, and cannot, therefore, be decided at this stage.'

" Accordingly, I am of the opinion that this point should not be decided at this stage. Nevertheless, as it has been dealt with, and as I do not agree with the conclusion which has been reached on this point, it is necessary for me to state my reasons.

" The Washington Statement prescribes the subject-matter of the dispute and the scope of the proposed application by Italy. The Application complies with the offer in this regard. This aspect of the problem has been fully argued and, indeed, it has given rise to no dispute. But the Statement does not prescribe the Parties to the procedure which it made available to Italy. It contained the following provision:

> ' The Governments of the French Republic, the United Kingdom and the United States declare that they will accept as defendants the jurisdiction of the Court for the purpose of the determination of such applications by Italy or by Albania or by both.'

" It is clear that this provision does not require or even suggest that the three Governments were intended to be the sole respondents. An examination of the entire Statement shows that there is nothing therein contained to preclude Italy from naming in the Application all of the Parties necessary to enable the Court to dispose of the questions which are set forth in clause (*b*).

" On the other hand, the Statement prescribes, in precise language, the nature of the application that Italy must make in order to comply with its terms. The offer of the three Governments to accept as defendants the jurisdiction of the Court was not general: it was solely ' for the purpose of the determination of such applications by Italy or by Albania or by both '. The words ' such applications ' refer to clause (*b*) of the Statement, which uses the following words:

> ' (*b*) Italy makes an application to the International Court of Justice for the determination of the question '

and then proceeds to state the subject-matter and scope of the question. These words are clear and unambiguous. They require Italy to make an application *for the determination of the question.* They have an ordinary and natural meaning: an application of such a nature that the question can be determined. They cannot, in their ordinary and natural meaning, be construed as authorizing or requiring Italy to make an application of such a nature that it is legally impossible for the Court to decide the question.

" There was no legal difficulty preventing Italy from making an application in which the Court would be able to determine the question.

" Accordingly, I am compelled to reach the conclusion that Italy, in making an application in which Albania was not named as a party, failed to make an application for the determination of the questions and consequently failed to comply with the terms of the offer set forth in the Washington Statement. At the same time, as Albania was a necessary and indispensable party to the proceedings, the Application did not comply with the provisions of Article 40 (1) of the Statute and Article 32

(2) of the Rules. Accordingly, there was a fundamental defect in the Application by which these proceedings were commenced."

In his Dissenting Opinion Judge Levi Carneiro said:

" I have voted in favour of the first finding of the Judgment but am, to my regret, unable to agree with the second.

" My opinion has been arrived at in view of certain considerations which the Court, in drafting its Judgment, has not regarded as relevant. So far as the first finding is concerned, I do not think that more need be said. But with regard to the second, the considerations which I have referred to were dictated by the necessity of maintaining proper procedural order in the present case and by my conception of the duty and the function of the Court, and I therefore find myself obliged to seek to justify them.

" 2. By its second Submission in the Application, Italy requested the Court to adjudge and declare

> ' that Italy's right to receive the said share of monetary gold must have priority over the claim of the United Kingdom to receive the gold in partial satisfaction of the Judgment in the Corfu Channel case '.

" By the terms of the Washington Statement, Italy was given an opportunity to make an application to

> ' the International Court of Justice for the determination of the question whether, by reason of any right which she claims to possess as a result of the Albanian law of 13th January 1945, or under the provisions of the Italian Peace Treaty, the gold should be delivered to Italy rather than to Albania '

and an opportunity

> ' to accept the jurisdiction of the Court to determine the question whether the claim of the United Kingdom or of Italy to receive the gold should have priority, if this issue should arise '.

" Might not the provision as drafted mean that Italy might adopt two different attitudes or take two different steps, in relation to the two separate questions involved: in respect of the first, to ' make an application to the Court ', in respect of the second, ' to accept the jurisdiction of the Court ' ? Do not these two expressions indicate two attitudes ?

" However, the Italian Application presented the two questions at the same time and asked the Court to adjudicate upon both of them.

" It is true that the Italian Government, in its Application, incidentally said:

> ' . . . once it has been established that Italy is entitled to damages from Albania . . . Italy's claim to the gold in question should have priority over the claim of the United Kingdom . . . '.

" This statement did not mean that the Court could not decide the priority issue before the claim had been held to be well-founded; the Applicant, at the time of making the application, set out the grounds on which it based its claim to priority and indeed to preference. Thus, it presented the two questions at the same time and in the same proceedings, making, in its Application, two Submissions relating to the two separate questions. These Submissions were put forward without any link between them, they are entirely distinct, and the second is in no way subordinate to the first. There is not even any form of conjunction between them. Nor, and this to my mind is decisive, is the word ' *subsidiairement* ' (alternatively) used, as it invariably is, when it is desired to indicate that a question is subordinate to another which has already been raised, and as in fact was done by the United Kingdom Government in the present case, in the Submissions which are set out in the Judgment. Yet the three ' Allied Governments concerned ', in their written Observations on the Preliminary Question, nowhere indicated that the Application had improperly raised the two questions.

" It was after filing its Application that the Italian Government raised the ' Preliminary Question ', and asked the Court to decide as to its competence to adjudicate upon ' *the first Submission* '. Although it indicated that the second question would arise only after the first had been decided, it referred nevertheless to the first Submission only. It never said, either when it raised its objection to the jurisdiction or in its arguments in its written Observations that, as a result, the present Judgment of the Court should relate to the second question as well. Again, its Submissions presented at the end of the oral arguments related exclusively to the first Submission in the Application.

" The second Submission was not, and could not be, discussed in the course of the hearings. Here, in particular, the complete independence of the two questions, from the point of view of their judicial determination, was made clear.

" 3. In the written Statement which it submitted to the Court, the Government of the United States said:

> ' . . . it seems doubtful whether Albania must have accepted the jurisdiction of the Court and have become a party in the present case before the Court can properly adjudicate on the claims of Italy vis-à-vis the United Kingdom concerning the gold here in question '.

" It seems to me that the second Submission in the Application has precedence over the first. Counsel for the Italian Government (at the hearing on May 10th) correctly interpreted this statement when he said:

> ' It is therefore proposed that the priority issue should be considered quite separately from the issue relating to the international responsibility of Albania resulting from the Albanian law.'

" This, indeed, is what was being done—I think correctly—because the second Submission involves the question which ought first to be decided by the Court. Therefore, even in the absence of finding in favour of Italy on the first Submission, the Court would, in the subsequent proceedings, have to adjudicate upon the second Submission. It has been asked to do so, and there is no reason why it should not.

" In the written Observations the French Government said nothing to indicate that it considered the two Submissions interdependent: it merely sought to show that the Court was competent to deal with them The oral arguments of its Agent merely related to the jurisdiction of the Court to adjudicate upon a question of international law—the effects of the Albanian Nationalization Law.

" It was indeed the United Kingdom Agent who, in his written Observations and in his oral arguments, asserted the complete dependence of the second Submission upon the first. He asked the Court to hold that, by reason of the objection to the jurisdiction raised by Italy, the Italian Application no longer conformed to the conditions and intentions of the Washington Statement; that it had become invalid and void. To justify such a conclusion, it would be necessary to consider that if the Court could not deal with the first Submission in the Italian Application, it would likewise be unable to pass upon the second Submission. Accordingly, the Agent of the United Kingdom Government said (at the hearing on May 12th) that the priority issue—the issue raised in the second Submission—would not arise if the Court should refuse to consider and to adjudicate upon the first Submission relating to Italy's claim.

" This did not, however, prevent the United Kingdom Agent from saying at the hearing on May 14th that the issue which arose in the present case was whether a certain quantity of gold should be transferred to the United Kingdom or to Italy—that is to say, the second question raised by the Application.

" In his Submissions at the close of the hearings, the United Kingdom Agent asked the Court to find ' that, if the Court holds, contrary to the contentions of the United Kingdom, that the Italian Application is still valid and subsisting, the Court has jurisdiction to determine on their merits the questions put to the Court in the Italian Application '. Here he was clearly not saying that the Court could not adjudicate upon the second Submission until it had adjudicated upon the first.

" 4. Counsel for the Italian Government, for his part, in his first address to the Court, on May 10th—while not modifying the Submissions contained in the Application, which I have already referred to—said that he agreed with the United Kingdom Government that the second Submission was dependent upon the first and could not be dealt with before adjudication upon the first. However, he refused to accept the consequence which the Agent of the United Kingdom Government contended flowed therefrom, namely, that the Italian Application was in effect cancelled or withdrawn.

" In his last address to the Court, on May 13th, Counsel for the Italian Government was much less categorical when he referred to the alleged dependence of the second Submission on the first; he in fact said:

> ' *The second claim is distinct from the first.* In the Washington Statement it is said that the question of priority would be submitted to the Court if this issue should arise. Consequently, it would seem that according to the Statement itself this second question is dependent upon the first. In any event, if the Court considers that the question of priority between the respective rights of the United Kingdom and Italy can be examined in a hypothetical form, independently of the examination of the first Italian claim, *the Italian Government, for its part, would have no objection* ' (my italics).

At the same time, Counsel insisted upon the fact that the Application had not been withdrawn.

" 5. It has been pointed out that the Washington Statement, with reference to the question of priority, uses the words ' if this issue should arise '. It has been contended that, in the view of the draftsmen of the Statement, the priority issue could only arise after the Italian claim had been held to be well-founded. This is not so. The Statement provided for the possibility of the question being put, but it did not specify when it would arise. The Italian Government has in fact submitted the question to the Court at the same time as the other, and the Respondents have raised no objection to this course, as I have already pointed out.

" 6. The only way of ensuring that neither question is dealt with—with the inevitable consequence of setting aside both questions—would be to regard the Application as cancelled or to reject it. It was because the United Kingdom Agent realized this that he asked the Court to hold that, by reason of the interdependence of the two questions, the whole Application was cancelled. The Court has indeed held that the questions are interdependent, but it has refused to regard the Application as cancelled. It has finally refrained from adjudication upon the second Submission in the Application, on the ground that the Parties themselves had asserted the dependent character of this Submission.

" The statements of the Parties have not, however, led me to a similar interpretation. In my opinion, if the two questions were inseparably interlinked, the presence of Albania would be just as necessary to make it possible for the Court to deal with the first as with the second. But this proposition was not stated either by the Italian Government, by the Respondent Governments or in the Judgment of the Court.

" I do not, in any event, consider that the Court would be obliged to follow any agreement in this connection thought to have been arrived at by the Parties. The Court, having unequivocally decided that the Application has neither been withdrawn nor cancelled, retains full freedom to decide for itself the question of the interdependence of the two Submissions in this Application.

" 7. If anything remains of the Application, it is its second Submission. If the Court is without jurisdiction in respect of the question raised by the first Submission—on the ground that Italy has not even named Albania, which is directly interested in this question as a Respondent—in respect of the second Submission, Albania has no interest whatsoever.

" In short, the priority issue has been submitted—and remains submitted—to the Court, and the only States directly interested in its decision on this question are before the Court. In my opinion, the Court cannot now refuse this decision on the ground that it lacks jurisdiction to decide another and quite separate question raised by the same Application. At the present stage of the proceedings, the Court, in my opinion, having simply to decide the Preliminary Question of its competence to adjudicate upon the first Submission in the Application, is not entitled to go beyond this and to hold, at the same time, that it has no jurisdiction to deal with the second Submission.

" Counsel for the Italian Government himself, in the document entitled ' Preliminary Question ', has indeed said that ' *the second question would raise no problem concerning the jurisdiction of the International Court of Justice* '. At the same time, he asserted that the Application had not been withdrawn, that is to say, that its second Submission remained even if, at this stage of the proceedings, the first should be set aside.

" 8. Procedural considerations would have provided the Court with a good reason for not at present setting aside the second Submission of the Application; but there was a better ground available to it for reserving consideration of, and a decision on, this other question, that is, the question of priority. The question of priority does not perhaps involve any dispute as to facts, but is to be resolved simply in the light of legal rules. The Court could have decided it, not by basing itself upon a hypothesis, but by dealing with it as a question of abstract law. It could have done so, subject at most to one condition. It could have decided it quite simply by recognizing the character of the two claims, without prejudging the question of the validity of the claim which has not as yet been established.

" I think it unnecessary to recall the widespread and valuable practice of ' declaratory judgments ' which is adopted in the United States and many other countries. It will be enough to point out that in all civilized countries there are laws governing the classification of creditors—in cases of bankruptcy, *concursus creditorum* following upon insolvency and what in France and other countries is called '*liquidation judiciaire*' (compulsory winding-up). The law strictly lays down orders of priority and of preference. In the present case, the Court should determine whether there is any ground for preference and the basis for priority. It would thus indicate the legal rule to be applied.

" In the majority of cases at least, priority is based neither upon the date nor the amount of the debt, nor even upon the character of its title, but rather on the nature of the right itself, its origin, or the specific relationship which may exist between it and the property of the debtor. In the present case, the Italian Government alleges that the two competing rights are identical in origin and of the same nature; it has already set out in the Application, with great precision and clarity, the only argument which it invokes in support of its claim to priority: it is that Albania's wrongful act as against Italy was earlier in date than Albania's wrongful act as against the United Kingdom. The Italian Government further alleges that its right must benefit from a privilege by virtue of Article 25 of the Convention of March 15th, 1925. That is all. In the subsequent proceedings an opportunity would have been given to the respondent Governments to contest these allegations, and Albania might have decided to intervene (although that country is not directly interested) and the Court could have adjudicated upon the alleged right to priority even without having previously recognized the validity of the Italian claim.

" 9. Such a decision would have provided a valuable contribution to the solution of the controversy provoked by the question of the allocation of the monetary gold. It would have been all the more useful for having been given before the decision on the first question, that of the validity of the Italian claim, which involves a number of questions of fact and of law. Such a course might have avoided the necessity for evidence and argument which would have ceased to be relevant.

" Anyone who studies the terms of the Submissions in the Application of Italy must come to the conclusion that the second Submission must, as I have said, be adjudicated upon before the first. How could the Court hold that the gold should be ' delivered to Italy '—and that is what is asked in the Application—without having previously found in favour of the right of the Italian claim to priority ?

" Moreover, whatever might have been the Court's decision on the second Submission, that decision would have provided the ' Allied Governments concerned ' with a very valuable orientation. If the Court had found that the United Kingdom claim was entitled to priority, the question raised in the first Submission of the Application would have lost all practical interest, since, according to statements which have not been disputed, the amount of the United Kingdom claim is more than twice the value of the gold in question. If, on the other hand, the Court had upheld the right to priority of the Italian claim, it would have given the three Powers the assurance (for which they have asked in one sense or the other) that the delivery of the gold to the United Kingdom could not be validly effected before final adjudication upon the merits of the Italian claim. Finally, there was a third possible solution, that neither claim might be held to be entitled to priority; in that case, if the Italian claim were held to be well-founded, there would be a proportionate allocation of the gold between the two creditors, it then being possible to deliver at once to the United Kingdom such portion as was due to it.

" In any event, the Court, by adjudicating upon the second Submission in the Application, would make the solution of the dispute more simple, clearer and more straightforward. On the other hand, I fear that its refusal to intervene in any way, after the three ' Allied Governments concerned ' have addressed themselves to the Court ' asking it to give them guidance ', may well give rise to a deadlock or aggravate the difficulties."

iv.—Judgment

International Court of Justice—Judgments of—Binding Force in Relation to International Court at Tangier.

See p. 136 (*Mackay Radio and Telegraph Company* v. *Lal-la Fatma Bent Si Mohamed El Khadar and Others*).

PART XI

WAR AND NEUTRALITY

A—WAR IN GENERAL

I.—Definition and Technical Meaning of War. Belligerency and Insurgency

War—Meaning of—Hostilities in Absence of Declaration of War—Korean Conflict—Term " War " in an Insurance Policy.

LANGLAS *ET AL. v.* IOWA LIFE INSURANCE CO.

United States, Supreme Court of Iowa. April 7, 1954.

THE FACTS.—This was an action on an insurance policy which contained a clause providing for double indemnity in case of death " in direct consequence of bodily injuries effected solely through external, violent and accidental means ", except for " death resulting directly or indirectly from . . . military or naval service in time of war . . . ". The insured died as the result of wounds sustained on March 25, 1952, while on active combat duty in Korea as a corporal in the United States Marine Corps. The Korean conflict was then in progress. The defendant insurance company denied its liability under the double indemnity clause by invoking the exception respecting death resulting from military service in time of war. The District Court gave judgment for the plaintiff.

On appeal,

Held: that the judgment of the District Court must be reversed, with directions to enter judgment for the defendant. The word " war " in the insurance contract was used in its ordinary sense, which was not confined to wars declared by Congress. The Korean conflict was so clearly a " war " within the meaning of the insurance contract that the Court would not invoke the rule that ambiguities in an insurance policy are to be construed against the insurer.

The Court said: " Can we say the phrase, ' military or naval service in time of war,' and the word ' war ' in the later phrase, ' war, riot or insurrection,' are, when given their popular and ordinary meanings, still so tainted with ambiguity that there is room for construction in which we must resort to the ' strictly against the insurer, liberally in favor of the insured ' rule ? The plaintiffs contend there is such uncertainty, and the learned trial court agreed. We arrive at a different conclusion.

" The difficulty arises from the fact that the Korean conflict, in which Ervin W. Langlas, Jr., met his death, was commenced, so far as the United States was concerned, without a formal declaration of war.

" The United States Constitution, Art. 1, § 8, says that only the Congress may declare war; President Truman sent out armed forces into the fighting in Korea without any action from the Congress. The legislative body was at no time thereafter asked to declare that a state of war existed, nor did it ever formally do so. The plaintiffs contend here that the meaning of the term ' war ' as used in the double indemnity exclusionary clauses is not clear; that it may have referred only to a war formally declared by the Congress; and so the ambiguity which they think exists should be resolved in their favor and against the defendant.

" The contention is one which is not without some plausibility, and it has been adopted by a few courts. We think it basically unsound. The purpose of the insurer in inserting the exclusionary clauses in the double indemnity provisions of the two contracts was to protect itself against the greatly added hazards of an actual war. Danger to the life of its assured, and so liability on the part of the company, would be no less because the chief executive, using his power and authority as Commander in Chief of the armed forces of the United States, committed us to a conflict with other nations without the constitutional sanction of a formal declaration by the Congress. This protection was obviously the motive of the insurer, and must have been apparent to the insured. It made no difference to either party to the contract whether the Congress acted; the executive committed us to a real and bitter war. Nor was this in any sense unusual. Phillipson, in his International Law and The Great War, page 53, points out that of 118 recognized wars occurring between 1700 and 1872, in only ten was there a formal declaration preceding the commencement of hostilities.

" In fact, it has long been recognized that the executive may, in many ways, embroil his country in war, so that the legislature has no opportunity to prevent it and no choice but to accept it as an accomplished fact. Or the war may result from a sudden attack by a hostile nation, requiring immediate retaliation before the Congress has any opportunity to act. With the present possibilities of guided missiles and rapid flight with loads of highly destructive bombs, he is naive indeed who will say we must wait until a formal declaration is promulgated before we are at war. Adopting the term ' war ' as it is now commonly understood, and looking to the evident purpose the language in the exclusionary clauses was intended to serve, we must hold the Korean conflict was a ' war ' within the meaning of the contracts. There is no room for application of the rule contended for by plaintiffs.

" The unreality of adopting an interpretation which would hold the Korean struggle not to be a war within any reasonable meaning is pointed up by the fact that as of March 28, 1952 (three days after the insured met his death in the fighting), total United States casualties were 106,956, with 16,739 killed and 77,651 wounded and 9,916 missing in action. Of all wars in which this country has been engaged, only the two World Wars and the Civil War exceeded the Korean struggle in cost in casualties and money.

"The plaintiffs urge that the insurer could have made the language clearer and more definite by specifying that an 'undeclared' war as well as a declared one was meant. Since we think the word 'war' is to be understood in its ordinary sense, and further that the popular connotation of the word is by no means limited to wars formally declared by the Congress to be such, we are unable to agree. Many conflicts have been referred to as 'wars' when there was no formal declaration. Thus, in the Iowa Code of 1950, Section 427.3, paragraph 2, I.C.A., are references to the 'war of the rebellion' and 'Indian wars.' The Philippine Insurrection has been held to be a war within the meaning of an exclusionary clause in an insurance contract. *La Rue* v. *Kansas Mutual Life Insurance Co.*, 68 Kan. 539. 75 P. 494. Likewise the Civil War, in the *Prize Cases, The Amy Warwick*, 2 Black 635, 17 L.Ed. 459; and the Boxer Uprising in China, *Hamilton* v. *McClaughry*, 10 Cir., 136 F. 445. The Maine Supreme Court has put it in this pertinent language: 'But every forcible contest between two nations, de facto, or de jure, is war. War is an existing fact, and not a legislative decree. Congress alone may have power to 'declare' it beforehand, and thus cause or commence it. But it may be initiated by other nations, or by traitors, and it then exists, whether there is any 'declaration' of it nor not. It may be prosecuted without any declaration; or Congress may, as in the Mexican War, declare its previous existence.' *Dole* v. *Merchants Mutual Marine Insurance Company*, 51 Me. 465, 470. In *Stankus* v. *New York Life Insurance Company*, *supra*, at page 689 of 44 N.E.2d[1], the Massachusetts Supreme Court said: 'A conflict between the armed forces of two nations under authority of their respective governments would be commonly regarded as war'. On page 688 of 44 N.E.2d, from the same citation is this statement: 'But the existence of a war is not dependent upon a formal declaration of war.' Hostilities on the high seas between naval forces of France and the United States were held to be a 'war' although there was no declaration. *Bas* v. *Tingy*, 4 Dall. 37, 1 L.Ed. 731. Webster's definition is: 'The state or fact of exerting violence or force against another, now only against a state or other politically organized body.'

"All of the foregoing authorities recognize that war is a fact, not dependent upon the formal declaration of Congress. More than that, they demonstrate the ordinary and common understanding of the term. If armed forces of two nations are in conflict, the ordinary

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[[1] See *Annual Digest*, 1941–1942, Case No. 135.]

observer knows they are at war; and he is not likely to draw fine distinctions. In common understanding war is war, whether declared or undeclared. Under the general definition of war, the term used in the double indemnity clauses included both declared and undeclared wars, and there was no need for a more particular designation. The whole is greater than any of its parts, and includes all of them.

" We have ourselves recognized this principle. In *Darnall* v. *Day*, 240 Iowa 665, 37 N.W.2d 277, we were concerned with an agreement on the part of a building owner to make certain improvements within one year after the close of World War II. More than one year after the close of actual hostilities, but before any official pronouncement of the end of the war, the remodeling had not been done by the landlord, and litigation developed. We held the war had ended within the meaning of the agreement; that it was the close of the fighting which was intended. To the same effect are *New York Life Insurance Company* v. *Durham*, 10 Cir., 166 F.2d 874, 786 [1], and *Stinson* v. *New York Life Insurance Co.*, 83 U.S.App. D.C. 115, 167, F.2d 233. Although we have in the case at bar the obverse side of the coin, the same reasoning applies. If it is the common understanding that a war is no longer a war when the shooting is ended, regardless of official pronouncements, we see no reason why the rule should not be applied in reverse. See *New York Life Insurance Co.* v. *Bennion*, 10 Cir., 158 F.2d 260 [2], in which it was held an insured's death in the Japanese attack on Pearl Harbor came as a result of war, although there was no official declaration at the time. As we said in *Darnall* v. *Day*, *supra*, at page 669 of 240 Iowa, at page 280 of 37 N.W.2d., ' War, in the practical and realistic sense in which it is commonly used, refers to the period of hostilities . . . .'

" We also pointed out in the Darnall case that the existence of a state of war as determined by the political departments of government is binding upon the courts only in matters of public concern; while as to private contracts the governing principle is the real intent of the parties. *New York Life Insurance Company* v. *Durham*, *supra*, and *Stinson* v. *New York Life Insurance Company*, *supra*, were cited and followed on this point.

" . . . A good case might be made for the contention that although the Congress did not officially declare a state of war to exist, it did for all practical purposes and in substantial effect recognize and ratify its existence. It appropriated billions of dollars for the carrying on of the struggle. It had, on October 6, 1949, enacted the Mutual Defense Assistance Act of 1949, 22 U.S.C.A. § 1571 et seq., providing for military assistance to the Republic of Korea in case of attack. It passed laws giving special postage rates for members of the armed forces in Korea, making them eligible for

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[1 See *Annual Digest*, 1948, Case No. 163.]

[2 *Ibid.*, 1946, Case No. 94.]

membership in the American Legion, and authorizing payment of a gratuitous indemnity to those who died in active service after June 27, 1950, the date of commencement of the Korean fighting. It granted certain veterans' benefits to those in active service after that date, and gave them income tax relief. Reports of its committees repeatedly refer to the ' Korean war.' There can be no doubt the Congress itself recognized the struggle as a ' war.' Since we hold there is no ambiguity in the language of the contracts, and the words must be taken in their common meaning, there is no occasion to go further into the question of ratification; but a strong argument might be made for such a holding.

" The case has been argued here by the plaintiffs on the theory that the contracts must be interpreted to mean there is no war unless the Congress of the United States has officially declared it to exist. The possibility of loss of life by the insured in a war in which other nations are involved has not been considered. Yet if we are correct in holding the real purpose of the exclusionary clauses was to protect against the abnormal and excessive risk incurred in war, declared or undeclared, it must appear liability is excluded if the insured engages in any war, even one in which the United States might not be involved. Many American fighting men, in both World Wars, enlisted in the Canadian service before this country was involved. In Korea, the Republic of Korea and many allies, in addition to the armed forces of the United States, members of the United Nations, were fighting the North Korean and Chinese Communist forces. Even if it were possible to say we were never in war in Korea because it was not declared, there was surely a war between many other nations there. In *Stankus* v. *New York Life Insurance Company*, *supra*, the insured lost his life through naval action while serving upon a United States destroyer on convoy duty in the Atlantic, before we entered World War II. The Massachusetts Supreme Court said there was at least a war going on between Great Britain and Germany, and the insured lost his life as an incident thereto.

" In addition to *Darnall* v. *Day*, which we think directly in point on the question here involved, there are three other Iowa cases involving war risk clauses. In *Boatwright* v. *American Life Insurance Co.*, 191 Iowa 253, 180 N.W. 321, 11 A.L.R. 1085, and *Swanson* v. *Provident Life Insurance Co.*, 194 Iowa 7, 188 N.W. 677, the question was whether the membership of the assured in the military or naval forces in itself barred recovery on his policy. They were ' status ' cases, as distinguished from ' result ' cases, in which the death must result from some activity peculiar to service. In the *Boatwright* case it was held the death of the assured from influenza was not connected with his naval service, and recovery was permitted. In the *Swanson* case, an opposite result was reached, on distinguishing facts. *Eggena* v. *New York Life Insurance Company*, *supra*, the third case, was a ' result ' case. As in the one we are now considering, the controversy arose over a double indemnity clause. The assured lost his life in a tank training accident, and the dispute arose as to whether his activity was military in its nature. We held it was, as a risk excluded by the double indemnity clause, and recovery was denied. We said, at page 265 of 236 Iowa, at page 531 of 18 N.W. 2d: 'It is a risk not contemplated in the premium and one for which there can be no actuarial guide in determining premiums. Thus the ordinary insurance company excludes cases of accidental death which occur through war as being too uncertain, and the liability probability too large.' This language is cited because it is important in our consideration of the intention of the parties in this class of contracts.

"The identical question here involved has been considered by several courts since the outbreak of the fighting in Korea. Of these, only two are courts of last resort, and they have taken opposite positions. The plaintiffs cite and rely much upon *Beley* v. *Pennsylvania Mutual Life Insurance Company* and *Harding* v. *Pennsylvania Mutual Life Insurance Company*. They were decided by the Supreme Court of Pennsylvania on February 14, 1953, and the opinions are found in 373 Pa. 231, 95 A.2d 202, and 373 Pa. 270, 95 A.2d 221, respectively. The majority and concurring opinions in the *Beley* case hold to the technical viewpoint, construing the intent of the parties to have contemplated a war declared by the Congress by virtue of its constitutional authority. The cases were decided by a four to two vote of the court, and we agree with the logic and authorities of the dissenting opinions.

The Supreme Court of Texas had the Pennsylvania cases before it when it handed down its opinion on October 7, 1953, in *Western Reserve Life Insurance Company* v. *Meadows*, Tex., 261 S.W.2d 554[1]. The Texas court took what we think the sounder position, holding the Korean conflict to be a 'war' within the intent of the insurance contract. Our agreement with the reasoning of the Texas court has already been indicated, and we have cited and followed many of the same authorities.

"Other courts not of final authority have had the question before them. In *Weissman* v. *Metropolitan Life Insurance Co.*, D.C., 112 F.Supp. 420, the United States District Court for the Southern District of California, refused to follow the Pennsylvania cases, holding there may be war without an official declaration thereof, and that in the absence of any indication the word was used in a technical sense it would be given its ordinary and common meaning. To the same effect is *Stanberry* v. *Aetna Life Insurance Company*, 1953, 26 N.J. Super. 498, 89 A.2d 134. Here the Superior Court of New Jersey, while conceding some consideration should be given to the holding of the highest court of the sister state of Pennsylvania, declined to follow it, but agreed with the logic of the dissenting opinions. It is only fair to say there are a few other courts of lower jurisdiction which have followed or agreed with the final determination of the Pennsylvania court. There are also cases holding, in opposition to *Bennion* v. *New York Life Insurance Company, supra,* that the attack on Pearl Harbor on December 7, 1941, was not a war or an act of war. *West* v. *Palmetto State Life Insurance Company,* 202 S.C. 422, 25 S.E.2d 475, 145 A.L.R. 1461 [1]; *Rosenau* v. *Idaho Mutual Benefit Association,* 65 Idaho 408, 145 P.2d 227 [2]; and *Savage* v. *Sun Life Assurance Co. of Canada,* D.C., 57 F.Supp. 620 [3]. The Idaho decision was by a bare majority of the court, with two justices dissenting. So far as these cases are in point, we do not agree with their reasoning and do not find them persuasive.

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[1] See *International Law Reports*, 1953, p. 578.]

"Our own case of *Darnall* v. *Day, supra,* has been widely cited and approved. The reasoning of this case still satisfies us, and we think it controlling, supported as it is by the many authorities above referred to .

" . . . A special concurring opinion in *Beley* v. *Pennsylvania Mutual Life Insurance Company, supra,* poses some questions which have been adopted by the plaintiffs herein, and which should be given attention. It is asked, when did the Korean conflict become a war ? How many casualties, 5,000 or 10,000, or more, must have been sustained before it would be a war ? Who is to determine at what point in time or casualties an undeclared struggle becomes a 'war' within the meaning of the terms of insurance contracts excluding liability for deaths as the result of 'war' ? The method of proving his point used by the learned Pennsylvanian justice is not an unusual one; but we do not agree with plaintiffs' counsel that the questions are unanswerable. At least they are not so in the sense that they have any important bearing on the case before us. We are not, in fact, concerned with the answers to the questions posed. What we must know is whether the Korean conflict, as it stood on March 25, 1952, when Ervin W. Langlas, Jr., met his death on the battlefield was a 'war' within the commonly understood meaning of the word. If it was such, as we have concluded, we need not go into fine distinctions as to when it became so, nor how many casualties or how much expenditure of blood and treasure made it so. . . ."

[Reports: 245 Iowa 713; 63 N.W. 2d 885.]

NOTE.—The above case is noted in *St. Louis University Law Journal,* 3 (1954), p. 221.

The same view of the Korean conflict as "war" for the purpose of life insurance contracts was taken in *Gagliormella* v. *Metropolitan Life Insurance Co.,* 122 F. Supp. 246 (D. Mass. 1954); *Carius* v. *New York*

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[1] [See *Annual Digest,* 1943–1945, Case No. 99.]

[2] [*Ibid.,* 1943–1945, Case No. 100.]

[3] [*Ibid.,* Case No. 95.]

Life Insurance Co., 124 F. Supp. 388 (S.D. Ill. 1954); and *Gudewicz* v. *John Hancock Mutual Life Insurance Co.*, 331 Mass., 752, 122 N.E. 2d 900 (1954).

War—Meaning of—Hostilities in Absence of Declaration of War —Korean Conflict—Whether War for Purpose of United States Military Law.

UNITED STATES *v.* AYERS.

United States, Court of Military Appeals. May 5, 1954.

THE FACTS.—As the result of a trial by general court-martial in 1953, the accused was found guilty of absence without leave. He had begun his unauthorized absence from Fort Lewis, Washington, on December 23, 1950. Article 43 of the Uniform Code of Military Justice provides for a two-year statute of limitations for the offense of absence without leave, but stipulates that this limitation has no application to absence without leave " in time of war ". An Army board of review held the offence not to have been committed in time of war. [Report: 12 C.M.R. 413 (1953).]

On certification by The Judge Advocate General of the Army,

Held: that the decision of the board of review must be reversed and the case remanded. The conflict in Korea was a " war " within the meaning of Article 43 of the Uniform Code of Military Justice even as to offences committed within the United States.

The Court said: " For compelling reasons expressed at the time, we have held in two recent cases that, for purposes of the administration of military justice, our forces in Korea were engaged in the prosecution of a war. *United States* v. *Bancroft*, 3 USCMA 3, 11 CMR 3[1], *United States* v. *Gann*, 3 USCMA 12, 11 CMR 12.[2] The authorities cited and the language and reasoning used in the disposition of these cases were not sufficient, nor were they intended, to invoke the wartime provisions of the Uniform Code as to military personnel within the confines of the continental United States. Of course, this was not done for the plain reason that we were not then, as we are now, confronted by that issue. However, it was determined explicitly that the hostilities existing at that time in Korea must be equated to a state of war for purposes of military criminal law.

" This conclusion was reached on the theory that—whether with or without Congressional assent—all of the practical consequences of a legally declared war were present as to United States troops in the Korean area—and that the yardstick of practicality must be used to measure the problems before us in Bancroft and in Gann. To put the matter only a little differently, we felt there that the reasons underlying certain provisions of military criminal law operative only

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[[1] See *International Law Reports*, 1953, p. 586.] [[2] *Ibid.*, p. 590.]

in time of war were fully served by the Korean situation. Thus, we concluded, since the reason for the rule existed, so also did the rule. It would appear, therefore, that the two cited cases furnish us at the same time with the resolution of an analogous issue and an approach to the one before us now—that of practicality, of broad realism, as distinguished from narrow legalism. Let us now scrutinize the problem of the cause at bar through the spectacles of the pragmatism implicit in the *Bancroft* and *Gann* cases.

" Recent civilian cases seem to support the applicability of such a practical approach in the present setting.[1] The Supreme Court of Texas recently passed on a claim for accidental death benefits with respect to an insured officer who was killed while travelling under military orders to Fairbanks, Alaska. There he was to perform official duties in connection with the construction of an air base. *Western Reserve Life Ins. Co.* v. *Meadows*,—Texas—, 261 SW2d 554, *cert.* den. 347 US 928, 98 L ed—, 74 S Ct. 531 [2]. The insurance policy in suit provided that the obligation to pay benefits would be void if the insured ' shall be in military, naval or allied service in time of war at the date of the accident.' The Texas court indicated that, within the framework of the insurance contract, the term ' war ' might be given its ' plain, ordinary and generally accepted meaning ' of ' war in fact '; or, on the other hand, might be accorded a more limited construction—that is one signifying ' technical war ' or ' legal war,' which is to say a war declared by Congress. The opinion suggested that, although the latter alternative be accepted, and if there be required legislative recognition of the existence of ' war,' this has been supplied in ample measure by numerous Congressional enactments. The Court emphasized that (at page 556). [The Court here quoted from the opinion in that case.]

"A Federal District Court, in *Weissman* v. *Metropolitan Life Ins.* Co. 112 F. Supp. 420 (SD Cal), took a similar position in construing an insurance contract proviso and denying double indemnity because this country was ' at war.' There the following language was used:

> ' In the case at bar (without admitting it was necessary under the circumstances for Congress to baptize the Korean conflict by giving it the name of ' war ') it is plain there certainly has been legislative sanction thereof. Because Congress has seen fit to provide money necessary to carry on the conflict, furnish arms, munitions, ships and troops and to proceed in the same manner as if there had been a formal declaration of war, under the authority of the Prize Cases, supra, this court certainly

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[1] No reference has been made in the body of the opinion to *United States* v. *Smith*, 342 US 225, 96 L ed 252, 72 S Ct 260, and related inferior court cases, dealing with Federal legislation suspending the running of the statute of limitations in fraud cases " when the United States is at war." This omission was advised—for the plain reason that the bearing of the Korean conflict on the problem there was in no slightest degree relied on by counsel or considered by the Court. Under no accepted theory of case interpretation of which the majority is aware may it be said that these decisions can help us here.

[[2] See *International Law Reports*, 1953, p. 578.]

is justified in finding that if such a declaration were necessary, nonetheless, the conflict has received the sanction of Congress.'

"The Iowa Supreme Court also recently ruled that the Korean hostilities constituted 'war' within the meaning of an insurance policy. See *Langlas* v. *Iowa Life Ins. Co.*,—Iowa—, — NW 2d—(April 7, 1954)[1] The Court remarked: [The Court here quoted from the judgment in that case.]

"A New Jersey court was faced with an identical problem. Pointing out that the word 'war' must be given a 'realistic interpretation' when used in private contracts, the court reached the conclusion that the hostilities in Korea constituted war within the meaning of the insurance policy's terms.[2] Various enactments were adverted to in support of the court's statement that 'Congress (as well as every person in the civilized world) knows that the United States is at war in Korea.[3] *Stanberry* v. *Aetna Life Ins. Co.* 26 N.J. Super. 498, 98 A.2d 134. It was precisely for the reasons set out in the preceding cases that we reached the conclusion expressed in the *Bancroft* and the *Gann* cases, *supra.*

"These civilian cases present instances in which, despite the familiar judicial tendency to construe insurance policies in favor of an insured person, recovery was denied because (1) 'war' was intended by both insurer and insured to receive a realistic interpretation, and (2) because—conceding arguendo that legislative sanction for war is required—numerous statutes attest that this understructure was amply supplied in the instance of the Korean imbroglio. Is this Court to assume that Congress charged its members to be less realistic in construing Article 43 (*a*)? Thus, although hostilities in Korea were being conducted under the banner of the United Nations, the significant feature to our notion is that American personnel and material in tremendous quantities were being shipped to the front. Certainly, seen from state-side, most of the attributes of a declared war were undeniably present. Apart from the enormous size of the earlier operation, we can, in fact, discern no significant difference between the Korean phenomenon and that found during the struggle described as World War II.

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[1] See *supra*, p. 416.]

[2] The realism of the New Jersey court is in line with that expressed in *New York Life Ins. Co.* v. *Bennion*, 158 F2d 260 (CA 10th Cir) cert den 331 US 811, 91 L ed 1831, 67 S Ct 1202 [*Annual Digest*, 1946, Case No. 94]. There the court concluded that a death occurring on December 7, 1941, took place while the United States was "at war"—with the result that the insured's beneficiaries were precluded by the policy from recovering double indemnity for an accidental death. The court states "When one sovereign attacks another with premeditated and deliberate intent to wage war against it, and that nation resists the attacks with all the force at its command, we have war in the grim sense of reality. It is war in the only sense that men know and understand it. Mankind goes no further in his definitive search—he does not stand on ceremony or wait for technical niceties. To say that courts must shut their eyes to realities and wait for formalities, is to cut off the power to reason with concrete facts. We cannot believe that the courts are deprived of the power to deal with this vital question in a practical and realistic sense." The Massachusetts Supreme Court considered a similar problem resulting from the death of a sailor on the U.S.S. *Reuben James* in October 1941. The court posed the possibility that even at that time the United States was engaged in a "war". *Stankus* v. *New York Life Ins. Co.* 312 Mass 366, 44 NE2d 687 [*Annual Digest*, 1941–1942, Case No. 135].

[3] North Dakota statutes enacted during World War II authorized loans to persons who had been members of the armed forces of the United States while the United States was at war. In December 1951 the Attorney General of North Dakota ruled that veterans of more than thirty days' service during the Korean hostilities were eligible for such loans. It was stated: "We are informed by the newspapers and radio that there are many thousands of American soldiers, sailors, Marines and airmen now engaged with soldiers of North Korea and China in open warfare. Can there be any doubt that the United States is now at war in Korea? We think not." See New York Times for December 28, 1951, page 2, column 4.

The New York Times of March 20, 1953, page 1, column 1, reports an expression of opinion by President Eisenhower with respect to the nature of the Korean fighting. The President "agreed with Clausewitz, the German warrior-philosopher, that there were all kinds of different wars, but he did not agree with President Truman that what was going on in Korea was a 'police action.' It would be his upbringing, he remarked, but he was inclined to think that Korea was a 'war'."

" In connection with the civilian cases mentioned earlier, we must emphasize that in Western Reserve Life Ins. Co. v. Meadows, supra, no death or specific incident in Korea was before the court for consideration. The remaining authorities cited do not indicate—or even suggest—that a different result would have been forthcoming had the insured been killed at a place other than in Korea. Yet it is insisted that we must restrict the ambit of Article 43 (*a*) to absences and desertions having their origin in the Korean zone of operations.

"An attempt to bolster this contention is made through the assertion that an anomaly would exist if we were to hold that absences originating within the United States are not subject to the statute of limitations at a time when they *are* subject to the limitations of the Table of Maximum Punishments. The premise seems to be that, since the President did not see fit to suspend the Table of Maximum Punishments as to desertions occurring within the continental limits of the United States, such desertions may not properly be regarded as having transpired in time of war.

" The unsoundness of this premise may be demonstrated by reference to events following World War II. De facto peace—that is, an end to the ' shooting war '—arrived during the fall of 1945. A cessation of hostilities was proclaimed on December 31, 1946. Pres. Procl. 2714. On January 19, 1946, the President terminated the suspension of certain portions of the Table of Maximum Punishments, save as to occupied territories. Executive Order 9683. On August 24, 1946, he terminated all remaining suspensions on maximum punishments. Executive Order 9772. Yet, so far as Congress was concerned, World War II for many purposes continued. Not until July 25, 1947, in fact, did Congress by Joint Resolution proclaim that World War II had come to an end insofar as the prosecution of wartime desertion was concerned. 61 Stat. 449. For certain other purposes World War II continued until 1951. *State* v. *Gibson*, 258 Ala 512, 64 So2d 75; *Miley* v. *Lovett*, 193 F2d 712 (CA

4th Cir), cert. den. 342 US 919, 96 L ed 687, 72 S Ct 366. Accordingly, any desertion occurring prior to July 25, 1947, is safely beyond the operation of the statute of limitations—and, indeed may be prosecuted to this very day. It is to be noted that this result obtains as to absences or desertions which began even subsequent to the time at which the President reimposed limitations on the punishment for such offenses. And the fact that the absence originated at a place far removed from conflict—or, indeed, at a time when all hostilities had ceased both in Europe and Asia—is wholly without significance.

" Congress simply intended that any unauthorized absence or desertion which occurred prior to the Joint Resolution of July 1947 should be subject to prosecution despite the passage of years. In determining what absences during the course of the Korean hostilities were meant by Congress to fall within the ambit of Article 43 (*a*), recourse may be had to a more specific applicability-index. In accordance with the pragmatic approach delineated earlier in this opinion, we can discern no difference in seriousness between a desertion from a main line of resistance in the Korean area and one from front line combat in the course of a fully declared war. Therefore we would be required to regard desertion from hostilities in Korea as falling within the purview of Article 43 (*a*). Cf. *United States* v. *Bancroft*, *supra*; *United States* v. *Gann*, *supra*. When asked —as now—to differentiate in result between an unauthorized absence occurring within the continental United States and one arising in Korea, we recognize immediately that, whether the defection occurs at a port of embarkation on the eve of a shipment of personnel, or following a unit's arrival in Korea, we are faced with essentially the same problem. In either instance the Armed Forces are deprived of a necessary—perhaps vitally necessary— combat replacement. In both instances the military is faced with a dilemma. Either its authorities must organize a costly search for the absentee, or the Armed Force concerned is required to risk the loss of his services permanently. Clearly, too, the deleterious effect on morale of unauthorized absence is more substantial when the absentee may be escaping the hazards and risks of transfer to the Korean conflict than when—as in ' peacetime '—he can evade no more than the comparatively minor inconveniences of service life.

" In peacetime, too, unauthorized absentees are ordinarily apprehended without difficulty, and no undue burden is placed on the Armed Forces by a rule requiring dispatch in the prosecution of offenders. However, under the disorganization and distractions of war, serious obstacles are apt to be encountered—both at home and abroad—in the apprehension of such culprits by persons and agencies concerned primarily with emergency functions of gravest importance to the national welfare. Admittedly there will be instances when, even during wartime, an absentee may be apprehended readily. Nevertheless, it is undeniable that the existence of hostilities increases not only the incentive for unauthorized absence, but also the ability to escape apprehension. It was largely for this reason, no doubt, that the pressures inherent in the statute of limitations were removed from the services during such a period. Although phrased somewhat differently, is it not as arguable in the case at bar—as it was in *Bancroft*—that where the reason for the rule of limitation fails, then the rule fails with it? And has not the reason failed here as completely as it would have done in the case of an international conflict declared in due and ancient form? We are sure that it has.

" The difficulty of apprehending and punishing unauthorized absentees in wartime was thoughtfully considered during the deliberations leading to the adoption of the Uniform Code. Hearings before House Armed Services Committee, 81st Congress, 1st Session, on HR 2498, page 1039. There Robert W. Smart, Esquire, professional staff member of the House subcommittee, said in speaking of a closely related matter: ' In peacetime, I do not think you are going to have so much difficulty in apprehending these people within the statutory period of limitations.' Again, in discussing the unauthorized absentee, he stated: ' In peacetime I still say that they will apprehend him in 9 cases out of 10, because of your regular troop activity, and the greater control over them. That is contrasted to wartime situations where you have great fluidity and movement of people all over the country and in all foreign countries.' House Hearings, supra, page 1041. Mr. Smart might well have added as an additional aggravating factor the high ratio during a ' war situation ' of untrained clerical, supervisory, and other personnel—with resultant inaccuracies in the maintenance of personnel accounting paper work and related activities.

" We believe it reasonable to assume from the foregoing that the removal of the statute ' in time of war ' was realistically conditioned by Congress on the existence of a state of affairs under which persons absent without proper authority might evade punishment through the running of the peacetime limitations rule. The risk of this latter was distinctly present after June 1950 for the reason that the stresses of war—de jure or de facto—may have been expected to preclude the maintenance of an adequate police force, and because inexperienced and overworked record custodians might understandably fail to note and to act properly with respect to an absence. The possibility that such offenders should go unpunished, while their fellows in Korea—who did not run away quite so precipitately—would stand amenable to prosecution, despite the lapse of the peacetime statutory period, might easily disturb the most placid student of the problem, and appears to have disturbed the Congress as well.

" Furthermore, it is obvious that modern integrated war operates to subject troops to the possibility of rapid transfer—often by air—to any point on the world's surface at which hostilities are blazing.

Units within the zone of the interior are, and must necessarily be, subject to distinctly higher requirements of combat readiness than during a previous period when a combat zone was more isolated. We entertain no doubt that the realities of atomic-age warfare were thought by the Congress to require measures which would insure combat readiness even of units located within the United States.

"Admittedly the statute of limitations applicable to a particular offense is not to be regarded as a part of the punishment for that offense. For this reason a period of limitation may be extended subsequent to the commission of a crime without violating proscriptions against *ex post facto* legislation. See, e.g., *United States* v. *Schauf*, 2 CMR (AF) 325; 15 Am Jur, Criminal Law § 342; 22 CJS, Criminal Law § 224, But, although no part of the punishment, it is undeniable that a ' long ' statute serves as an added deterrent to the commission of crime—since it decreases the possibility of escaping successful prosecution for a contemplated offense, and thus enhances the risk associated with that offense.

" The gravity of wartime desertion and absence without leave—a gravity which under modern conditions of mobile warfare is largely independent of where the crimes occur—together with the probability that, if a short period of limitations were applicable, these offenses would carry their own immunity, convinces us that Congress intended Article 43 (*a*) to apply during the hostilities in Korea even to unauthorized absences originating within the United States. Certainly the reasons for authorizing unlimited prosecution for state-side desertions during the time of the Korean fighting seem as understandable as those which underlay Congress' decision to exclude from the statute of limitations desertions which followed the termination of hostilities in World War II, but preceded the Joint Resolution of July 25, 1947. Moved by what we conceive to be the clear policy underlying Article 43 (*a*), we must hold that no limitation applies to unauthorized absences, whether from a unit located in Korea or within the continental limits of the United States.

" Certain concluding observations seem fitting. First, we must emphasize that the absence with which we are presently concerned began at a time when large-scale hostilities were in progress in Korea, and not merely during a period of what has been characterized as ' cold war.' Secondly, there is involved here no question of purloining from Congress the power to declare war, or not to declare it. The Articles of War and the Uniform Code—on both of which the instant prosecution may be said to be premised—derive from Congress alone, and not from any other branch of the Government. It seems to us, therefore, that there is no need to consider the constitutional division of powers between the executive and legislative branches of the Government. Instead we are concerned only with the intent and purpose of the latter arm in the exercise of its power. Finally, in view of the fact that the phrase ' time of war ' appears in several distinct Articles in the Uniform Code, supra—e.g., Articles 43, 90 and 106—we are constrained to point out that its meaning, as it may be used in any particular Article, must be determined with an eye to the goal toward which that Article appears to have been directed.[1] This cautious and individualized approach toward Articles of the Code—far from being incongruous—seems dictated by the precedent of Congressional intent in dealing with the problems of World War II. Upon the termination of actual hostilities in World War II, Congress indicated unmistakably that it wished the War to terminate for certain purposes, but allowed it to remain in effect for others. Our concern in coping with this and other legal problems arising out of the Korean situation must be with determining as a matter of interpretation whether, within the framework of Congressional intent, war existed for the purposes of the specific provision under consideration."

(Quinn C.J. dissented on the ground that the " insurance clause cases are not germane " and that " Congress and the President have unmistakenly indicated that the war in Korea did not create a ' state of war ' in the continental limits of the United States.")

[Reports: 4 U.S.C.M.A. 220, 15 C.M.R. 220.]

NOTE.—For previous cases dealing with the question whether the conflict in Korea constituted a " war " for the purpose of the administration of military justice, see *United States* v. *Bancroft* (see *International Law Reports*, 1953, p. 586). The holding in the *Bancroft* case as to the existence of a state of war in Korea and Japan was followed by the Court of Military Appeals in *United States* v. *Christiansen*, 4 U.S.C.M.A. 22, 15 C.M.R. 22 (offering violence to an officer); *United States* v. *Aldridge*, 4 U.S.C.M.A. 107, 15 C.M.R. 107 (drunk while on duty as sentinel); *United States* v. *Anderten*, 4 U.S.C.M.A. 354, 15 C.M.R. 354 (desertion); and by a board of review in *United States* v. *Dill*, 15 C.M.R. 468 (assault upon a superior officer). The offence of leaving post as a sentinel committed after the conclusion of the Korean Armistice Agreement was held by a board of review to have been committed in time of war on the ground that "Although a war might be thought to end when the shooting stops, the federal courts have consistently held to the contrary, ruling that a war ends only by treaty, legislation or specific Presidential proclamation . . ." (*United States* v. *Smith*, 17 C.M.R. 406).

The Court of Military Appeals followed the *Ayers* case as to offences committed in the United States in *United States* v. *Taylor*, 4 U.S.C.M.A. 232, 15 C.M.R. 232 (fraudulent enlistment), and a board of review did likewise in *United States* v. *Gause*, 16 C.M.R. 586 (desertion).

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[1] The cases construing " war " within the meaning of insurance policies form a close parallel to our present problem. There the courts are inquiring into the basic purpose of the insurer and insured in excluding the payment of double indemnity benefits for death arising from military service in time of " war." See *Langlas* v. *Iowa Life Ins. Co., supra*. We are concerned with the purpose of Congress in conditioning various legal consequences on a state of " war."

VI.—Belligerent Forces

War—Belligerent Forces—Resistance Movements in Occupied Territory.

State of The Netherlands *v.* B.

Holland, Military Court of Appeal. January 5, 1954.

The Facts.—During the occupation of the Netherlands many persons whom the German Occupant for various reasons sought to arrest lived under fictitious names and at secret addresses. For the purpose of feeding these persons in hiding, called "*onderduikers*" ("submerged"), the resistance groups who had undertaken to look after them needed food, ration-books and money. These were to a large extent voluntarily put at their disposal by individuals or Netherlands authorities who had stocks at their disposal. In some cases, however, the resistance groups had to seize these articles by force, sometimes even by force of arms.

After the liberation some of these forcible seizures were brought before the courts. Raids and assaults that had taken place after September 5, 1944, were brought before the courts-martial if those who had carried them out were members of any of the resistance organizations specified by the Minister of War in London as forming together the Forces of the Interior. A Royal Decree of September 5, 1944, of the Netherlands Government in London established that volunteers belonging to resistance organizations designated by the Minister of War were to be considered as military persons and that courts-martial were therefore the competent courts in these cases. In the present case, a group of three men belonging to the Forces of the Interior and under the command of the accused had on January 10, 1945, raided a shop in one of the back streets of The Hague. A coal merchant living there was suspected of black market activities and the group expected to find in his house foodstuffs and money. The accused, who had a number of "submerged" in his care, was in urgent need of money as the source from which he had been used to draw for that purpose no longer had any funds available. It so happened that more people were in the coal merchant's house than the group had expected to find there, and they could not accomplish their objective. Moreover, there was a risk that one of the persons present might raise an alarm, with the result that the group might fall into the hands of the Occupying Power. In order to cover the retreat of his group the accused fired a number of shots, and hit the coal merchant, who had resisted. He was fatally wounded and died a few days later.

A court-martial convicted the accused and sentenced him to a suspended sentence of six months' imprisonment. He appealed to the Military Court of Appeal.

Held: that the judgment of the Court-Martial must be quashed and the defendant acquitted.

The Court said: " The activities of the group which were called for in the circumstances and during the occupation, usually referred to as ' surprises ', must, when carried out under competent command, be considered lawful warlike operations of the Forces of the Interior, provided that the unwritten rules accepted by the *bona fide* resistance groups were observed. This implied, *inter alia*, that the use of violence was permitted only in so far as it was strictly necessary either for completing the task or for the safety of those who carried it out. In view of the organization of the resistance movement in The Hague and of the general situation prevailing there in January 1945, the accused had to decide where and in what way the necessities were to be obtained for the sustenance of the ' submerged ' entrusted to his care. The raid of January 10, 1945, on the house of the coal merchant was an admissible ' surprise '. During this raid a number of inhabitants, including the victim, resorted to violent action against the accused's group. A situation then arose which formed so serious a threat to the safety of his group that an immediate retreat was necessary. By firing a few shots from his loaded pistol the accused secured a safe retreat for his group. In the circumstances, this behaviour was essential for his group's timely withdrawal. Consequently, it must be considered as being a lawful act of war, which he had to perform in his capacity of commander. This was an action admissible under the rules of the law of war—an act committed by the defendant in war-time within the limits of his competence. Therefore it is not punishable."

[Report: *Tijdschrift*, Vol. II, p. 301.]

V.—Effects of Outbreak of War

ii.—On Treaties

War—Effects of Outbreak of—On Treaties—Treaty Relating to Immunity from Taxation of Property Owned by Governments—Effect of Trading With the Enemy Act—The Law of the United States of America.

BROWNELL *v.* CITY AND COUNTY OF SAN FRANCISCO.

United States, California Court of Appeal, First District. June 21, 1954.

THE FACTS.—The Attorney-General of the United States, as successor to the Alien Property Custodian, brought this action against the City and County of San Francisco for the recovery of taxes for the years 1941 to 1948 which had been paid under protest on real property owned by the German Government from April 1941 to September 1947, when title was vested in the United States.

The premises in question were used by the German Government as the quarters of its Consulate-General. Upon the closing of all German consular establishments in the United States on July 14, 1941, the property was placed in charge of a caretaker. At the outbreak of war between Germany and the United States, the Consulate of Switzerland took over supervision of the property as representative of the German Government and continued such supervision until June 1945, when the United States Department of State assumed control, pursuant to a protocol entered into with the Swiss Government. In July 1947, the Department of State released control of the property to the Office of Alien Property of the Department of Justice for vesting purposes. Until the date of vesting, September 4, 1947, office equipment and furniture were stored in the building, and consular records were kept in the building until the United States Secretary of State assumed control of the property.

A Treaty of Friendship, Commerce and Consular Rights between the United States and Germany, signed at Washington, December 8, 1923, *United States T.S.* No. 725, 44 Stat. 2132, provided:

> " Lands and buildings situated in the territories of either High Contracting Party, of which the other High Contracting Party is the legal or equitable owner and which are used exclusively for governmental purposes by that owner, shall be exempt from taxation of every kind, National, State, Provincial and Municipal, other than assessments levied for services or local public improvements by which the premises are benefited."

The Superior Court, City and County of San Francisco, gave judgment for the plaintiff. The defendant appealed, contending that the tax exemption provision of the Treaty was suspended or abrogated by the outbreak of war, that the provision was suspended or abrogated by Congressional enactment and by presidential or executive action incompatible with its enforcement, that a finding that the premises were used by the German Government for consular purposes during 1941–1947 was not supported by the evidence, and that the tax exemption, if it had existed theretofore, terminated when title was vested in the United States in September 1947.

On appeal,

Held: that the Treaty of 1923 exempting from taxation the lands and buildings of either nation situate in the territory of the other was not abrogated or suspended by the outbreak of war, since the immunity from taxation therein provided was not incompatible with the existance of a state of war. The view of the Department of State that the Treaty remained in effect was to be considered persuasive. The Trading With the Enemy Act and action taken thereunder was similarly not incompatible with the continued effectiveness of the Treaty. The custodial and protective care given to the property constituted a " governmental use ". The tax exemption of the property was not terminated by its vesting.

The Court said:

" (1) *Was this tax exemption provision of the treaty suspended or abrogated by the declaration of war between Germany and the United States in December,* 1941 ?

" Not necessarily, for it has already been determined that a clause of this treaty which accords to the nationals of each country the right to inherit real property in the territory of the other was not suspended or abrogated by that declaration of war nor by the hostilities which ensued. *Clark* v. *Allen,* 331 U.S. 503, 67 S.Ct. 1431, 91 L.Ed. 1631.[1]

" In such an inquiry as this, ' We start from the premise that the outbreak of war does not necessarily suspend or abrogate treaty provisions.' *Society for the Propagation of the Gospel* v. *Town of New Haven,* 8 Wheat. 464, 494, 495, 5 L.Ed. 662. There may of course be such an incompatibility between a particular treaty provision and the maintenance of a state of war as to make clear that it should not be enforced. *Karnuth* v. *United States,* 279 U.S. 231, 49 S.Ct. 274, 73 L.Ed. 677. Or the Chief Executive or the Congress may have formulated a national policy quite inconsistent with the enforcement of a treaty in whole or in part. This was the view stated in *Techt* v. *Hughes,* . . . [1920, 229 N.Y. 222, 128 N.E. 185, 11 A.L.R. 166], and we believe it to be the correct one. That case concerned the right of a resident alien enemy to inherit real property in New York. Under New York law, as it then stood, an alien enemy had no such right. The question was whether the right was granted by a reciprocal inheritance provision in a treaty with Austria which was couched in terms practically identical with those we have here. The court found nothing incompatible with national policy in permitting the resident alien enemy to have the right of inheritance granted by the treaty. Cardozo, J., speaking for the court, stated the applicable principles as follows: ' " The question is not what states *may* do after the war has supervened, and this without breach of their duty as members of the society of nations. The question is what courts are to presume that they have done. . . . President and Senate may denounce the treaty, and thus terminate its life. Congress may enact an inconsistent rule, which will control the action of the courts (*Fong Yue Ting* v. *United States,* 149 U.S. 698, 13 S.Ct. 1016, 37 L.Ed. 905). The treaty of peace itself may set up new relations, and terminate earlier compacts, either tacitly or expressly. . . . But until some one of these things is done, until some one of these events occurs, while war is still flagrant, and the will of the political departments of the government unrevealed, the courts, as I view their function, play a humbler and more cautious part. It is not for them to denounce treaties generally, *en bloc.* Their part it is, as one provision or another is involved in some actual controversy before

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[[1] See *Annual Digest,* 1947, Case No. 82.]

them, to determine whether, alone, or by force of connection with an inseparable scheme, the provision is inconsistent with the policy or safety of the nation in the emergency of war, and hence presumably intended to be limited to times of peace. The mere fact that other portions of the treaty are suspended, or even abrogated, is not conclusive. The treaty does not fall in its entirety unless it has the character of an indivisible act." 229 N.Y. at pages 242–243, 128 N.E. at page 192, 11 A.L.R. 166.' *Clark* v. *Allen*, *supra*, 331 U.S. 503, 508–510, 67 S.Ct. 1431, 1435.

" It does not appear that exempting the ' lands and buildings ' of either nation from taxation by the other is so incompatible with the maintenance of a state of war as to require an inference that the contracting parties intended the abrogation or suspension of such exemption during time of war.

" How could the use[1] made of this property during 1941–1947 and the tax exemption of property so used interfere with or impair our war effort ? Continued recognition of such exemption would seem no more incompatible with the maintenance of war than was our continued recognition of Germany as the owner of this property. Nor does continued recognition of such ownership and the attendant tax exemption seem any more incompatible with a state of belligerancy than the right of inheritance accorded nationals of the respective contracting parties by article IV of the same treaty. It is important to bear in mind the reciprocal aspect of this tax exemption. It is of equal benefit to the respective contracting parties. The United States benefits from the tax exemption of its ' lands and buildings ' in Germany just as does Germany benefit from the tax exemption of its ' lands and buildings ' in this country. That interest conceivably is as important in time of war as in time of peace, to the United States as well as to the German government.

" Persuasive of this view is the attitude of our State Department, expressed in three communications to our Department of Justice. ' The Department of State is of the view that the legal effect of these provisions [that portion of article XIX of the treaty hereinabove quoted] was unchanged by the outbreak of war between the United States and Germany. This view is in complete accord with the policy long followed by this Government, both in time of peace and in time of war, with regard to property belonging to the government of one country and situated within the territory of another country. This Government has consistently endeavoured to extend to the property of other governments situated in territory under the jurisdiction of the United States of America the recognition normally accorded such property under international practice and to observe faithfully any rights guaranteed such property by treaty. This Government, likewise, has been equally diligent in demanding that other governments accord such recognition and rights to its property in their territories.

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[1] For the purpose of this phase of the discussion we assume that such use was a governmental use by the owner, the German government.

'The history of this Government's treatment of the German diplomatic and consular properties in the United States following the outbreak of war between the United States and Germany may be of interest in connection with this matter.

'By a note dated December 12, 1941, the Swiss Minister in Washington informed the Secretary of State as follows:

'"I have the honor to inform you that the German Government has asked the Swiss Federal Council to take charge of the German interests in the United States for the duration of the war. Subject to the American consent, the Swiss Government has declared its willingness to assume this responsibility.

'"In consequence, I should be very much obliged to you if you would be so good as to let me know whether the American Government is ready to give the above-mentioned consent, sought by my Government."

'The Under Secretary of State replied on behalf of the Secretary of State by a note dated December 16, 1941, to the Minister of Switzerland as follows:

'"In acknowledging the receipt of your note of December 12, 1941, announcing the request of the German Government that the Swiss Federal Council assume the representation of German interests in the United States for the duration of the war, I have the honor to inform you that the Government of the United States agrees to the assumption of German interests in the United States by the Swiss Government."'

'Pursuant to these notes, the property of the German Government in the United States, including the above-mentioned property in San Francisco, was recognized by this Government as being in the custody of the Swiss Government until May 23, 1945, when, by a protocol signed at Washington on that date by the Minister of Switzerland and an Assistant Secretary of State, the Minister of Switzerland released such property to a representative of the Government of the United States of America. That protocol reads in part as follows:

'"All respective premises, archives, and property are only transferred to the American Government

'"First: In view of the fact that Germany has surrendered unconditionally; and

'"Second: Inasmuch as the American Government is the trustee of the governments which will exercise authority in Germany."

'The signature to that protocol by Assistant Secretary of State, "J. C. Holmes," is preceded by a statement reading:

'"I accept as of this date for the account of the American Government and under the stipulations set forth above, the premises, archives, and property described in this Protocol.'"

'In view of these considerations, the Department of State perceives no objection to the position which the Office of Alien

Property is advancing that the provisions of the second paragraph of Article XIX of the treaty signed December 8, 1923 with Germany remain in effect despite the outbreak of war between the United States and Germany.' (Signed for the Acting Secretary of State by Jack B. Tate, Acting Legal Adviser, addressed to the Honorable Tom C. Clark, Attorney General, and dated November 10, 1948.)[1]

"Of similar import are communications of December 27, 1950, from Warde M. Cameron, Assistant Legal Adviser of the Department of State, to Harold I. Baynton, Assistant Attorney General, and of May 24, 1951, from Jack B. Tate, Deputy Legal Adviser of the Department of State, to Harold I. Baynton, Assistant Attorney General, Department of Justice, each introduced in evidence herein.

"Defendant's argument which leads it to the conclusion that the tax exemption clause under consideration was suspended when war was declared, depends principally upon an erroneous assumption that the exemption was given solely to facilitate the performance of consular functions and ceases to operate during any period of cessation or suspension of consular activities. That is too narrow an interpretation. The clause under consideration does appear in a series of articles which deal with 'consular officers' and their functions and privileges but as a physically separable provision which is significantly broad and general in its terms, not limited or restricted to 'consular' officers, offices, or activities. Instead, it uses the expressions 'lands and buildings' in the territory of either High Contracting Party of which 'the other High Contracting Party' is the legal or equitable 'owner.' Such lands and buildings, if 'used' exclusively for 'governmental' purposes by that 'owner,' are exempt from taxation. These general terms token an intent not to limit the exemption to periods of use for any particular purpose (such as the active conduct of consular affairs) but for any use which is 'governmental.' Also, defendant overlooks the reciprocal feature, the benefit to our government of freedom from taxation of its property situate in Germany territory

"This reciprocal tax exemption clause bears no such relation to the active conduct of consular affairs by either of the contracting parties as would warrant an inference or give rise to a presumption that the parties intended its suspension during the suspension of the active conduct of consular affairs by either of them.

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[1] We take judicial notice of this communication from the Secretary of State to the Attorney General as an official act of an executive department of the United States government, Code of Civ. Proc. § 1875, subd. 3; *Southern Pac. Land Co.* v. *Meserve*, 186 Cal. 157, 159, 198 P. 1055, a letter of instructions from the commissioner of the land office to the United States surveyor-general in California; *Southern Pacific Co.* v. *Lipman*, 148 Cal. 480, 491, 83 P. 445, a letter of the commissioner of the general land office to the registrar and receiver of the land office at Los Angeles. See also *Bourdieu* v. *Seaboard Oil Corp.*, 38 Cal.App.2d 11, at page 23, 100 P.2d 528, and *Livermore* v. *Beal*, 18 Cal.App.2d 535, at pages 540–542, 64 P.2d 987, and cases there cited. Courts take judicial notice of treaties and their interpretation by the judicial and the executive branches of government. *San Lorenzo Title & Improvement Co.* v. *Caples*, Tex.Civ.App., 1932, 48 S.W.2d 329, 331, affirmed 124 Tex. 33, 73 S.W.2d 516 [*Annual Digest*, 1931–1932, Case No. 55].

" (2) *Was this tax exemption provision suspended or abrogated by congressional enactment or by presidential or executive action incompatible with its enforcement?*

" Defendant contends that the provisions of the Trading with the Enemy Act, 50 U.S.C.A.Appendix, §§ 1–40, as amended by the First War Powers Act, 50 U.S.C.A.Appendix, §§ 619–620, and certain actions taken by the President, the Secretary of State and the Attorney General of the United States evince a national policy inconsistent with the recognition or enforcement of the tax exemption provision of the treaty. Defendant especially invokes certain of the provisions of sections 2, 3, 5, 6, 32 and 39 of the Trading with the Enemy Act.

" Section 3 of the Act severely restricts trading with the enemy as defined in section 2. The policy indicated by such restrictions has no apparent bearing upon or inconsistency with the policy that each of the two governments refrain from taxing the ' lands and buildings ' of the other.

" Section 5 provides that

> ' any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States '.

Section 5 is implemented by the provisions of section 6. This vesting provision is a frank recognition of alien ownership and the continuation thereof in time of war, as to each item of property so owned, until the vesting power is exercised. We fail to see how the creation of such a power evinces a congressional policy which is incompatible with the tax exemption of that very property in time of war.

" Defendant says that sections 32 and 39 declare a policy never to return to an enemy alien property taken from him by the exercise of the vesting power. Such a policy, defendant argues, renders purposeless the tax exemption clause. It says there would be no conceivable benefit accruing to the German government by continuing the tax exemption of property seized. Even from such a premise that conclusion does not necessarily follow. Such property and its proceeds in the hands of our government appear to be subject to the claims of creditors of the former owner (see 50 U.S.C.A. Appendix, §§ 32–36), an element of some benefit to the former owner. More significant in the present inquiry is the fact that section 32 was not added to the statute until March 8, 1946, 60 Stat. 50; sections 33–36, not until August 8, 1946, 60 Stat. 925–930; and section 39, not until July 3, 1948, 62 Stat. 1246. Moreover, sections 32–36 do not prohibit the return of property to the former owners. They simply fail to provide for such return. It was not until the addition of section 39 on July 3, 1948, that Congress adopted the policy of no return. By that enactment it declared that

> ' No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act (sections 1–6 and 7–39 of this Appendix), shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein.'

50 U.S.C.A. Appendix, § 39; enacted by 62 Stat. 1246. That occurred well after the events involved in this action. Of further significance is the fact that section 12 of the Trading with the Enemy Act has continuously provided that 'After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct ', unless meanwhile conveyed pursuant to order of the President or of a court in accordance with the provisions of sections 9 and 10 of the act. Act of October 6, 1917, 40 Stat. 411 at 142. It happens that after World War I Congress provided for the return to Germany and certain other former belligerants of money or other property held by our alien property custodian if it had been the ' diplomatic or consular property of such Government '. Act of June 5, 1920, amending section 9 of the Trading with the Enemy Act; 41 Stat. 977 at 979. Accordingly, even after the vesting in September, 1947, and until the addition of section 39 to the statute in July, 1948, there was the possibility that the property here involved might ultimately be returned to the German government.

" The actions of the President, the Secretary of State and the Attorney General by which, according to the defendant, the executive branch of our government evinced a policy incompatible with the recognition of this tax exemption during the war consisted, for the most part, of orders made pursuant to the provisions of the Trading with the Enemy Act, culminating in the Attorney General's vesting order of September 4, 1947. Those actions of the executive branch appear to us no more indicative of an incompatible national policy than the provisions of the statute which authorized such action.

" There is some evidence that when our State Department took over from the Swiss government, in accordance with the protocol hereinbefore mentioned, consular records, papers and documents were removed from filing cabinets and put into boxes. Defendant infers therefrom that the State Department did as it pleased with those records, thereby violated the consular immunity, and thus evinced a national policy inconsistent with a continuance of the tax exemption here involved. We see no basis for such an inference. For aught that appears in this record, the removal of papers and documents from filing cabinets to boxes may have been for the better protection and preservation of those papers and documents. Even if there were a basis for defendant's inference, such action by the State Department would not necessarily indicate that it entertained a policy inconsistent and incompatible with the continuance of the tax exemption, especially in view of its explicit expression of opinion to the contrary on three separate occasions. (Communications to the Attorney General in 1948, 1950, and 1951, above cited.)

" Defendant also attaches significance to the cessation or termination of consular activities by executive action taken prior to the outbreak of the war. Such action was no more incompatible with the continued existence of this tax exemption than are the provisions of sections 2 and 3 of the Trading with the Enemy Act, already discussed.

" We conclude, in the words of the Supreme Court in *Clark* v. *Allen*, *supra*, that ' the Trading with the Enemy Act and the Executive Orders do not evince such hostility to ownership of property by [or exemption from taxation of lands and buildings of] alien enemies as to imply that its acquisition [or the continued recognition of the tax exemption] conflicts with national policy.' At page 510 of 331 U.S., at page 1436 of 67 S.Ct.

" (3) *Does the evidence support the finding that from April* 29, 1941, *until the vesting order in September*, 1947, *the property in question was used by the German government for governmental purposes* ? [1]

" Concerning the custodial and protective care given this property during the period in question, defendant contends that it was not throughout a use by the ' owner,' the German government, nor a use for ' governmental purposes,' nor actually a ' use ' of any kind within the meaning of the statute. The principal fallacy in defendant's line of reasoning inheres in its assumption that the words ' used exclusively for governmental purposes by that owner ' mean use by the government of Germany as the office of the German Consulate at San Francisco in the active conduct of consular affairs. This is the same fundamental fallacy which led the defendant to conclude, erroneously, that this tax exemption provision was automatically suspended or abrogated upon the declaration of war in 1941.

" We are persuaded that the custodial and protective care given this property throughout the period in question was a ' use ' of that property, and that such use was for a ' governmental purpose.' The exercise of such a custodial and protective function of government owned property would seem clearly to be a governmental function.

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[1] The finding was that the property was ' used by the German government exclusively for governmental purposes, to wit, as Office of the German Consulate General in the City and County of San Francisco, State of California, and for no other purpose or purposes whatsoever.' This description of the use ' as Office of the German Consulate General ' was unnecessarily specific. The treaty accords the exemption in respect to property used ' exclusively for governmental purposes ' not confining it to a use for a consular office only.

" While not precisely the same as the instant case in all respects, the decision in *City of Springfield* v. *United States*, 1 Cir., 1938, 99 F.2d 860 (petition for writ of *certiorari* denied by the Supreme Court, 306 U.S. 650, 59 S.Ct. 592, 83 L.Ed. 1049), is persuasive. In that case the Circuit Court of Appeals for the First Circuit held that property which was acquired and until 1933 used as a site for a post office and since that time, pending its disposal, had been leased and used by the lessee as a bus terminal, was exempt from taxation under a state statute that exempted property owned by the United States and ' " constitutionally held and used by it for essential governmental functions " ' 99 F.2d at page 862. ' There can be no question ', said the court ' that the property had been constitutionally acquired and held and used for essential governmental functions up to 1933, or so long as it was used as a post office site. Upon its abandonment as a post office site, Congress (citations), it is equally clear, had power in the exercise of its governmental functions to dispose of any such property held by it. (Citations). The right to dispose of property by the United States which is no longer needed, is an essential governmental function in the economic management of governmental affairs, and is recognized (citations); and while the government is seeking a purchaser, the leasing of such property conditioned on a thirty days' notice to terminate such lease in case a purchaser is found cannot have the effect of subjecting such property to taxation by the municipality in which it is situated (citation),' 99 F.2d at page 863. Of similar import is *Security State Bank* v. *Dent County*, 1940, 345 Mo. 1050, 137 S.W.2d 960. It held that a lot purchased by a county for a jail site but actually used to store cordwood used in county buildings and to store county road machinery, was used for governmental purposes.

" The custodial care given this property during the period in question was probably the maximum ' use ' that could be made of it by the owner during that period. The preservation of the property, whether in the hope of again using it as a consular office or for a residence for the consul or for ultimate sale, would seem clearly to be a ' use ' of it and a use for ' governmental purposes.'

This was also a use by the ' owner,' the German government; directly so until shortly after war was declared, then through the medium of the Swiss government and later through the medium of our Department of State.

" Persuasive of these conclusions are the views expressed by our State Department in its communication of May 24, 1951, to the Attorney General of the United States, above cited:

' The exemption from taxation provided in Article XIX of the German treaty is applicable reciprocally to lands and buildings of which either the

United States or Germany is the legal or equitable owner situated in the territory of the other, and which are exclusively used for " governmental purposes " by that owner. The provision in not limited in its application to property used for consular purposes. An interpretation which limited the application of the provision to property used exclusively for consular purposes, or to property used only as a consular office, and not as a residence for the Consul General as well, would not be in accord with this Government's interpretation of the provision or with the evident intent of the negotiators of the German treaty.

'As you are no doubt aware, this Government has had occasion to acquire sizable amounts of property abroad to be used as embassies, legations, consulates, and other governmental establishments. In many foreign countries the United States has found it necessary or desirable to purchase or otherwise acquire property for use as residences of employees of this Government stationed abroad. It would appear that a restrictive interpretation by a court in the United States of the meaning of the phrase " used exclusively for governmental purposes " would have an adverse effect upon the status of property owned by the United States abroad. The Department might thereafter be precluded from contending that many pieces of such property were used by the United States for governmental purposes, and should, therefore, be exempt from taxation.

' The Department is also of the view that the use of the premises after the consulate was closed for the storage of official documents and other property owned by the German government should be considered as a use of the premises for governmental purposes within the meaning of Article XIX.'

" (4) *Was the tax exemption, if it existed theretofore, terminated when title was vested in the United States in September,* 1947 ?

" Defendant contends that the following language of section 36 of the Trading with the Enemy Act terminated the tax exemption of this property immediately upon acquisition of title by the United States by the vesting order of September, 1947:

> ' The vesting in or transfer to the Alien Property Custodian of any property or interest . . . shall not render inapplicable any Federal, State, Territorial, or local tax for any period prior or subsequent to the date of such vesting or transfer . . . .' [and] ' The Alien Property Custodian shall . . . pay any tax incident to any such property or interest . . . at the earliest time appearing to him to be not contrary to the interest of the United States. . . . Every such tax shall be paid by the Alien Property Custodian to the same extent as nearly as may be deemed practicable, as though the property or interest had not been vested in or transferred to the Alien Property Custodian . . . .'

This language, in its context, means simply that property which up to the time of vesting had been subject to taxation would not become exempt therefrom upon becoming property of the United States pursuant to a vesting order of the Attorney General. The clause first quoted simply says that the ' vesting ' does not of itself ' render inapplicable ' any tax otherwise applicable. It does not by its terms render applicable any tax which is otherwise inapplicable.

The second clause merely directs the Alien Property Custodian to pay any tax ' incident to ' any property which becomes vested in him, meaning of course any tax otherwise incident. There was no city and county tax ' incident to ' the land and building here involved because of the exemption accorded by article XIX of the treaty. Section 36 was added to the Trading with the Enemy Act in 1946, 50 U.S.C.A. Appendix, § 36; 60 Stat. 925 at 929. It had long since been established that property belonging to the United States was exempt from taxation. *Irwin* v. *Wright*, 258 U.S. 219, 228, 42 S.Ct. 293, 66 L.Ed. 573. It had recently been established that the title which the United States acquires by a vesting order is absolute. *Cummings* v. *Deutsche Bank*, 1937, 300 U.S. 115, 120–121, 57 S.Ct. 359, 81 L.Ed. 545. [1] Congress doubtless deemed legislation necessary to prevent federal acquisition of title from terminating the tax liability of property which was otherwise subject to taxation."

[Reports: 126 Cal. App. 2d 102, 271 P2d 974.]

NOTE.—The above case is noted in *Michigan Law Review*, 53 (1955), p. 758.

War—Effect on Treaties—Treaty between Annexed State and Third State—Outbreak of War between Third State and Annexing State—Whether Such War Affects Operation of the Treaty.

See p. 262 (*Heller* v. *La Soie de Paris*).

iii.—On Private Contracts

War—Effect on Contracts—Trading with the Enemy—Current Account at Bank—Whether Abrogated or Frustrated by War—Unjust Enrichment—Accrued Right—Locality of Debt—Whether Payment to Custodian is Discharge of Obligation.

ARAB BANK LTD. *v.* BARCLAYS BANK (DOMINION, COLONIAL AND OVERSEAS).

England, House of Lords. May 4, 1954.
(Lords Morton, Reid, Tucker, Asquith and Cohen.)

THE FACTS.—This was an appeal from an Order of the Court of Appeal dated May 21, 1953, dismissing an appeal from, and affirming a judgment of, Parker J. dated November 11, 1952, whereby he dismissed with costs an action brought by the present appellant, the Arab Bank.

The appellants were formerly incorporated in Palestine and had their head office in Jerusalem. In 1939 they had opened a current account with the respondents' branch at Allenby Square, Jerusalem, the respondents being an English banking agency with their principal place of business in England. In the action in this case they were now suing for repayment to them of their credit balance of £582,931 3s. being the equivalent in sterling of 582,931.146 Palestine pounds.

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[1] See *Annual Digest*, 1935–1937, Case No. 228.]

The British mandate for Palestine ended at midnight on May 14/15, 1948. Immediately thereafter, by a Declaration of Independence and a Proclamation, a Provisional Government of the State of Israel was constituted, and large scale hostilities broke out between Israel on the one hand and Arabs in Palestine and certain Arab States, including the Hashemite Kingdom of Jordan, on the other. Jerusalem itself was divided, the Arabs holding the old walled city, the Jews the new city outside the walls. The Arab Bank was in the old part, but eventually moved to Amman in Jordan and became registered there. Barclays' Allenby Square branch was in the new city and was occupied by Jewish forces until the armistice of April 3, 1949; it was reopened in July 1950 and it was then within the territory of the State of Israel which had been recognised by His Majesty's Government in the previous April.

Certain enactments of the Provisional Government of Israel were in point. On May 19 it passed a Law and Administration Ordinance, No. 1 of 5708 (1948), having effect from May 14, 1948, by Article 11 of which it was provided that the law which existed in Palestine on May 14, 1948 (*viz.* English law), should remain in force, in so far as it was not repugnant to enactments of the State of Israel. Thus the English common law regarding trading with the enemy applied, and it was illegal for anyone in Israel to have intercourse with anyone in enemy territory.

Further, by the same Ordinance the Defence (Finance) Regulations in force in Palestine were continued with amendments and substitutions, with the result that it became unlawful, except with the permission of the Israeli Government, for anyone in Israel to make a payment to a person resident outside Israel.

Further, by regulations of December 12, 1948, the property of "absentees" was vested in a custodian, absentees being in general persons who owned property in Israel and who, in or after November 29, 1947, had gone outside Israel. Where the property was in the form of a debt, the person indebted was to pay the sum to the custodian. Parker J had found, and the appellants now admitted, that they were absentees within the meaning of the regulations.

On February 8, 1951, in response to a request by the Custodian, the respondents paid the sum of 582,931.146 Palestine pounds to him, and now said, therefore, that they were not liable to pay either that sum or its equivalent to the appellants.

On April 27, 1950, *de jure* recognition was accorded by His Majesty's Government to Israel, but with the reservation that only *de facto* recognition was given to Israeli sovereignty over that part of Jerusalem occupied by her. In April 1951, His Majesty's Government gave *de jure* recognition to the Hashemite Kingdom of Jordan, with a similar reservation in respect of the part of Jerusalem occupied by the Arabs.

The appellants argued that their contract of current account, being an executory contract, had been either abrogated or frustrated by the outbreak of war; that in consequence they had an action against the respondents for money had and received; and that this remedy was not located in Israel, the natural place for its discharge being the respondents' headquarters in London, and that accordingly it was not affected by the Israeli decrees.

To this the respondents replied that the debt created by the original contract was not destroyed by the war but was an accrued right which survived the war. The appellants' action therefore must be for the original debt, and not an action for money had and received. But that debt was located in Jerusalem and subject in all respects to the Israeli decrees and to the Israeli law concerning trading with the enemy.

Held: that the appeal must be dismissed. The right of the appellants to be paid the credit balance was not abrogated or frustrated by the war but survived it, subject to suspension of their right to recover it. Being, however, locally situated in Israel, it became subject to Israeli legislation and vested accordingly in the Custodian. Therefore it was not now recoverable by the appellants from the respondents.

Lord Morton of Henryton said : " Sir Andrew Clark, for the appellants, contended that upon the outbreak of war the contract between the appellants and the respondents was wholly destroyed and with it was destroyed the right of the appellants to payment of their credit balance in accordance with that contract. Thereupon there arose, by operation of law, a new right in the appellants to have the amount of their credit balance repaid to them as money had and received by the respondents for a consideration which had wholly failed. This new right, being wholly independent of the contract between the parties, was free from the two limitations imposed upon the current account, viz., that the respondents were only bound to repay it (1) after demand made, and (2) at the Allenby Square branch. The sum of £P582,931.146 became a ' simple debt ' owing from the respondents to the appellants; that debt was locally situate at the ' administrative centre ' of the respondents (*i.e.*, London) and the appellants were entitled to claim repayment in London. As a matter of procedure, the courts in England would not order repayment in foreign currency, and the appellants were therefore entitled to payment of the equivalent sum in pounds sterling which they had claimed by their writ. Counsel submitted, in the alternative, if I understood him aright, that if any part of the pre-existing rights and obligations between the parties survived the outbreak of war, it was a debt shorn of all the incidents which attached to it immediately prior to the outbreak of war, including the restrictions that the debt was only payable at the Allenby Square branch and after demand made.

"My Lords, I think I fully understand and appreciate counsel's first argument, and I shall deal with it hereafter, but I say at once that I can see no foundation whatever for his alternative argument. The right of the appellants immediately before the outbreak of war has already been stated and is beyond dispute. I can well understand the argument that this right was wholly destroyed on the outbreak of war, but I see no reason why a right to be paid a sum in Palestine on demand, if it survived the outbreak of war, should be changed into a right to be paid the same sum in some other place, without demand. Nor was any authority cited to your Lordships which gave any support to this argument.

"With regard to Sir Andrew's first argument, it is to be noted that that argument fails in limine if the appellants' right to be paid the credit balance survived the outbreak of war and was a right to be paid at the Allenby Square branch. In that event there could be no doubt that that right vested in the custodian and was rightly paid to him by the respondents. Before I consider this argument further, I shall refer to two authorities on which Parker J. and the Court of Appeal strongly relied.

"Lord Dunedin in *Ertel Bieber* & *Co.* v. *Rio Tinto Co. Ltd.*, [1918] A.C. 260, 267–8, stated the common law of England as to trading with the enemy as follows:—'My Lords, the proposition of law on which the judgment of the courts is based is that a state of war between this kingdom and another country abrogates and puts an end to all executory contracts which for their further performance require, as it is often phrased, commercial intercourse between the one contracting party, subject of the King, and the other contracting party, an alien enemy, or anyone voluntarily residing in the enemy country. I use the expression "often phrased commercial intercourse" because I think the word "intercourse" is sufficient without the epithet "commercial". As to this I agree with the judgment of the Court of Appeal in the case of *Robson* v. *Premier Oil and Pipe Line Co. Ltd.*, [1915] 2 Ch. 124, 136, where Pickford L.J., delivering the judgment of the Court, Lord Cozens-Hardy M.R., himself and Warrington L.J., said: "The prohibition of intercourse with alien enemies rests upon public policy, and we can see no ground either on principle or authority for holding that a transaction between an alien enemy and a British subject which might result in detriment to this country or advantage to the enemy is permissible because it cannot be brought within the definition of a commercial transaction." That so expressed it is an incontrovertible proposition admits, I think, upon the authorities, of no doubt.'

"Lord Dunedin went on to point out that there are certain exceptions to the general rule. He said [1918] A.C. 260, 269: 'There is indeed no such general proposition as that a state of war avoids all contracts between subjects and enemies. Accrued rights are not affected though the right of suing in respect thereof is suspended. Further, there are certain contracts, particularly those which are really the concomitants of rights of property, which even so far as executory are not abrogated. Such as, for instance, the contract between landlord and tenant, of which an example may be found in the recent case of *Halsey* v. *Lowenfeld* [1916] 2 K.B. 707. In other words, the executory contract which is abrogated must either involve intercourse, or its continued existence must be in some other way against public policy as that has been laid down in decided cases.'

"The law of Israel on this subject is admittedly the same as the common law of England. No authority was cited which decided whether a credit balance on current account payable on demand is or is not an accrued right within the meaning of the exception; but I agree with the courts below in thinking that strong support for the view that it is such a right is to be found in the case of *Schering Ltd.* v. *Stockholms Enskilda Bank Aktiebolag* [1946] A.C. 219; . . .[1]"

[His Lordship then stated the facts of that case and cited passages from the speeches of Lords Thankerton, Russell of Killowen, and Goddard, concerning the survival of accrued rights, or debts, during war. He continued:]" My Lords, I have quoted these passages in full because I think that they supply a conclusive answer to Sir Andrew's argument. He began by referring to the well-known case of *Joachimson* v. *Swiss Bank Corporation*, [1921] 3 K.B. 110, in which the Court of Appeal held that where money is standing to the credit of a customer on current account with a banker the making of an actual demand is a condition precedent to the bringing of an action to recover such money, in the absence of any such agreement to the contrary. It followed, said counsel, that the appellants had no right of action at the moment when war broke out; their rights were purely contractual rights and the contract was abrogated wholly by the outbreak of war. A right which did not carry with it an existing cause of action was not an 'accrued' right within the meaning of Lord Dunedin's observations in the *Ertel Bieber* case [1918] A.C. 260. My Lords, in my view this argument is inconsistent with the decision of this House in the case of *Schering* [1946] A.C. 219 and with the reasoning on which that decision is based. In the *Schering* case there was no existing right of action to recover the remaining instalments, for these instalments had not yet become payable; yet this House held that the right to receive these instalments when they fell due was a right which survived the outbreak of war. Having regard to this decision, I do not think that the right which was vested in the appellants at the

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[[1] See *Annual Digest*, 1943–1945, Case No. 105.]

outbreak of war can be held to have been destroyed merely because no action could be brought to recover it without a previous demand. I am content, without elaborating the matter further in words of my own, to adopt the reasoning of Jenkins L.J. when he said, [1953] 2 Q.B. 527, 569, speaking of the *Schering* case:

> ' If, as was recognized in the case just cited, a debt contracted before the outbreak of war, but made payable by instalments on dates occurring after such outbreak, is not abrogated by such outbreak, but merely suspended as regards enforcement, and this notwithstanding the right of the debtor to an acknowledgment, and transfer of a security upon the payment of each instalment, I fail to see why it should be held that a debt contracted before the outbreak of war should be cancelled merely because it is payable on demand. By parity of reasoning a credit balance kept by an enemy with a bank in this country on terms that it was to be payable against production of a passbook or deposit receipt would be cancelled by the outbreak of war. Once the exception of accrued rights is accepted, and once the basis of it, viz., that the law in its concern to prevent benefit to enemies does not go the length of confiscating enemy property, is recognized, I see no reason in principle or common sense why a debt for the recovery of which some formality, such as a demand for payment or the production of some indicia of title, is made requisite, should on that ground be excluded from the benefit of the exception. This would, indeed, be nothing more or less than the very confiscation of proprietary rights which the law declines to countenance.'

" My Lords, I do not attempt the task of formulating an exhaustive description of the rights which do and the rights which do not survive the outbreak of war; but I am quite satisfied that the right to be paid a credit balance on a current account is a right which survives. It is a right which the creditor can assign or bequeath by his will; it passes on his intestacy and it is, in my opinion, an ' accrued right ' in the sense in which these words were used by Lord Dunedin in the *Ertel Bieber* case [1918] A.C. 260, 269. It was therefore suspended, and not destroyed, by the outbreak of war, and immediately after the outbreak of war it was locally situate in the newly created State of Israel. Thus it became subject to the legislation of that State, was vested in the custodian by the respondents. There was a difference of opinion in the court below as to whether the necessity for a demand survived the outbreak of war. I incline to the view that it did, but I do not regard a decision on this question as being necessary for the decision of this case.

" The question whether the appellants will or will not ultimately recover the large sum already paid by the respondents to the custodian is one which will be answered by Israeli legislation, or by the arrangements made between the State of Israel and the Arab countries when a treaty of peace is signed; but they cannot recover that sum from the respondents.

" It was for those reasons that I formed the view that the appeal should be dismissed."

Lord Reid said: " It is admitted that on all questions relevant to the decision of this case there is no difference between the law of England, the law of Palestine, and the law of Israel which superseded the law of Palestine in the territory occupied by the Israeli forces. So it is necessary to determine what under English law is the effect of the outbreak of war on a current account kept by a bank in this country for a customer resident in enemy territory.

" The general principle is not in dispute. With certain exceptions the outbreak of war prevents the further performance of contracts between persons in this country and persons in enemy territory. It is not merely that an enemy cannot sue during the war, and that trading and intercourse with the enemy during the war are illegal. Many kinds of contractual rights are totally abrogated by the outbreak of war and do not revive on its termination. On the other hand, there are other kinds of contractual rights which are not abrogated ; they cannot be enforced during the war, but war merely suspends the right to enforce them and they remain and can be enforced after the war. ' There is indeed no such general proposition as that a state of war avoids all contracts between subjects and enemies. Accrued rights are not affected though the right of suing in respect thereof is suspended. Further there are certain contracts, particularly those which are really the concomitants of rights of property, which even so far as executory are not abrogated ': *Ertel Beiber & Co.* v. *Rio Tinto Co. Ltd.*, [1918] A.C. 260, 269, *per* Lord Dunedin.

" The first question in this case is whether the appellants' right to obtain payment of the sum at their credit on their current account was totally abrogated by the outbreak of war or whether that right was merely suspended. For a reason which will appear later, the appellants say their right was totally abrogated, but the respondents say that it was merely suspended: the appellants say that their right was not an ' accrued right ' ; the respondents say that it was. In the case of *Ertel Bieber & Co.* [1918] A.C. 260 it was necessary to consider precisely the scope of the exception of accrued rights from abrogation: it appears to be an extension of the principle that rights of property are not destroyed or confiscated on the outbreak of war. A right to payment of money due under a contract is not strictly speaking a right of property—the creditor has no property in the debtor's money before it is paid to him—but if before the outbreak of war the creditor had an immediate and unqualified right to sue the debtor for money due under a contract then it is not disputed that such a right is suspended but is not abrogated. The creditor in such a case has not only an accrued right but an accrued right of action. But the appellant's right in this case fell short of that, and I must now consider first what was the appellants' right immediately before the outbreak of war.

" In *Joachimson* v. *Swiss Bank Corporation*, [1921] 3 K.B. 110, the firm N. Joachimson had a current account with the defendant bank. On August 1, 1914, the firm was dissolved by the death of one of the partners and on that date a balance of £2,321 was standing to the credit of the firm. Later one of the partners raised an action in the firm name to recover that sum, but for some reason he gave an undertaking that the only causes of action relied on arose on or before August 1, 1914. His action failed because, although the customer's account was then in credit, the customer had then no cause of action against the bank. The case decides, in my judgment rightly, that a customer must make a demand for payment at the branch where his current account is kept before he has a cause of action against the bank. Generally it is the duty of a debtor to seek out his creditor and tender the amount of his debt, but there is nothing to prevent parties from agreeing, if they wish, that that shall not be the duty of the debtor, and it was held that a contract of current account necessarily implies an agreement that that shall not be the bank's duty; otherwise the whole object of the contract would be frustrated. The balance at the customer's credit is only payable at the branch where the current account is kept and so the customer must go there or send his instructions there before he can get his money.

"At one stage of this case the appellants maintained that they had made a demand for payment before the outbreak of war, but they do not now maintain that and therefore the position is that at the outbreak of war they had no cause of action against the respondents. But in my judgment that does not mean that there was no debt owing to them by the respondents. The sum at their credit was immediately payable to them. It is true that it was only payable in a particular place and that to get the money they had to go there and ask for it, but the case is in my opinion quite different from a case where one party still has to perform some service or fulfil some obligation under the contract in order to earn the money. In such a case further performance of such contractual obligation being prevented by frustration that party can never do what is necessary to earn the money and so can never acquire a right to have it paid to him; nothing was owing to him when the war broke out, so there is no 'accrued right' to suspend.

"But the sum at the credit of a customer on current account has always been regarded as a debt due by the bank to the customer. In *Rogers* v. *Whiteley* [1892] A.C. 118, the respondent was a banker, a judgment debtor had a credit on account current with him and a garnishee order attached 'all debts owing or accruing due' from him to the judgment debtor. There was no suggestion that the word 'debts' in Ord. 45, r. 1, is used in any special sense, and Lord Halsbury L.C. said [1892] A.C. 118, 121, that the order attached 'all debts, that is to say all money which Mr. Whiteley could be called upon to pay away.' In *Plunkett* v. *Barclays Bank Ltd.*, [1936] 2 K.B. 107, 118–9, du Parcq J. (as he then was) said:

> ' I find it impossible to say that money paid into a client account kept with a bank in the name of a solicitor is not a debt owing from the banker to the solicitor. It cannot be denied that the relation of debtor and creditor subsists between the bank and the solicitor. The solicitor may at any time draw a cheque upon the account and the bank must honour it.'

In *Swiss Bank Corporation* v. *Boehmische Industrial Bank* [1923] 1 K.B. 673, 681, Scrutton L.J. said:

> ' Does this debt of £9,000 arise in this country ? It is a sum held by a banker, who is resident in this country, for his customer and not payable until it is demanded in this country. In my view that is a debt arising in this country and situate in this country.'

And Atkin L.J. [1923] 1 K.B. 673, 684 (as he then was) referred to that debt as ' property '. In *Richardson* v. *Richardson* [1927] P. 228, Hill J. cited several cases where judges of great authority have referred to sums due on current account as ' debts ' or ' property.'

" It was argued that although that may have been the view generally held before *Joachimson's* case [1921] 3 K.B. 110, that decision shows that all that the customer of a bank really has is a right to create a debt by performing a condition of the contract current account, i.e., making a demand for payment. But eminent judges who do not use inaccurate language have since that case continued habitually to refer to sums due on current account as debts although no demand for payment has been made. Indeed, I think that in *Joachimson's* case Atkin L.J. recognized that there is a debt before any demand for payment is made, for he said:

> ' It was suggested in argument that the effect of our decision will be to alter the facilities given to an execution creditor to attach his debtor's bank account in garnishee proceedings. This appears to be a mistake. The provisions of Order 45 apply to debts owing or accruing from the garnishee, and this expression includes debts to which the judgment debtor is entitled though they are not presently payable.'

There is no suggestion of any anomaly in treating a sum at credit on current account as a debt for the purpose of garnishee proceedings and I do not see the point of the last part of the passage I have just quoted unless Atkin L.J. regarded such a sum as in fact a debt to which the judgment debtor is entitled but which is not presently payable. It is clear that the existence of a debt does not depend on there being a present right to sue for it. Debitum in presenti, solvendum in futuro is a familiar concept and a demand for payment is in my view merely that which makes the debt solvendum.

" In *Schering Ltd.* v. *Stockholms Enskilda Bank Aktiebolag* [1946] A.C. 219, a debt was payable by instalments and when war broke out some of the instalments were not yet payable. The right to payment of those instalments was held not to have been abrogated in spite of certain specialties in the case. The view of the majority of the House with regard to the contract was that ' all that remained was the payment of the price, and the only provisions remaining operative related to the payment of the debt due in respect of the price, and the relative safeguards for its payment' (*per* Lord Thankerton *ibid.* 236). The preservation of debts from abrogation is to some extent anomalous and I agree with what Lord Goddard said *ibid.* 269:

> ' Now one of the reasons why a suspensory clause to operate in the event of war in a contract for the sale of goods to an enemy will not save the performance of the contract from abrogation as illegal is that to ensure to an enemy a supply of goods or raw material after the war is or may be to enhance his resources during the war. If this consideration were taken to its full logical extent it might be said to apply to debts, as it would certainly be of some benefit to an enemy to have an English debt remaining due to him even though it is not payable till the end of the war. He might be able to raise money from neutrals upon an assignment of his rights which could be enforced at the conclusion of the war. But this doctrine never has been applied to debts arising out of previous contracts, and I am not prepared now for the first time to apply it and to hold that accrued causes of action are destroyed and not suspended because otherwise an enemy might obtain a discount or some other benefit by reason of the continued existence of the obligation.'

But I think that Lord Goddard went too far in referring to ' accrued causes of action ': in *Schering's* case [1946] A.C. 219, there can have been no accrued cause of action at the outbreak of war because the instalments in question had not then become payable.

"Accordingly, I am of opinion that on May 15, 1948, there was a debt of £P582,931 due by the respondents to the appellants and that it was a debt situated in Jerusalem where alone it was payable. Further performance of the contract of current account was prevented by the outbreak of war so that no further banking services could be performed by the respondents for the appellants, but the debt fell within the class of accrued rights and was not abrogated. The respondents have paid the amount of the debt to the Custodian of Absentee Property in Israel, and if this was a debt situated in Israel after May 15 they were bound to make that payment and the appellants cannot recover anything in this action. To succeed, the appellants would have somehow to establish that any debt owing to them was not after May 15 situated in Israel, because it is only in that case that the respondents would have been wrong in making payment to the custodian in Israel.

" The appellants' main contention is that their rights under the contract were wholly abrogated, because they followed that up by maintaining that in place of those rights there sprang up a new right to the same sum which was not situated in Israel, and they base this contention on the authority of *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.* [1943] A.C. 32. But if their original right to the money was not abrogated the possibility of there being this new right does not arise and I shall say nothing about it.

"Alternatively, on the footing that their original rights were not totally abrogated, they contend that the original debt was only situated in Jerusalem because of the terms of the contract, and once those terms have been abrogated the debt ceased to be situated there and become due as an ordinary debt in England where the respondents have their principal place of business. That would be a startling result. In times when transfer of money from one country to another is restricted it may be of great importance to a debtor that his debt should only be payable at the place stipulated. What survived the outbreak of war was the original debt, and the original debt was a debt payable at the respondents' branch in Jerusalem on demand there. The right to demand and to sue for that debt was suspended, but I do not see how that suspension could alter the nature of the debt. For the reasons which I have stated I agreed that this appeal should be dismissed."

Lord Tucker said: " My Lords, the law with regard to the effect upon contracts of frustration due to war is based upon public policy. It requires that as to future performance the contract is considered as abrogated, but that in so far as certain accrued rights are concerned they are to be preserved and kept in suspense. No attempt has ever been made to give an exact definition of these rights or to compile a comprehensive list of them. It is clear, however, from the cases of *Ertel Bieber* [1918] A.C. 260, and *Schering* [1946] A.C. 219 that they include accrued causes of action for debt and certain concomitant rights in respect of property, but it is also clear from the latter case that so far as liquidated sums of money are concerned they are not confined to cases where a cause of action has actually accrued at the date of frustration, but include instalments payable in the future. How does public policy require the special relationship existing between banker and customer in respect of the balance standing to the customer's credit on current account to be treated? It is true that this relationship requires a formal demand by the customer before his rights crystallize into a cause of action, but what is there in the requirements of public policy that necessitates a distinction being drawn between the case where the customer has made formal demand a moment before the outbreak of war and one where he had not gone through this formality? In both cases there is standing to his credit a sum of money which before war was for all practical purposes as valuable to him as if it were cash in his own safe, and in each case the outbreak of war makes payment illegal. In one case is there to be suspension and in the other confiscation? Or is the law, in order to escape from this dilemma, to devise some novel equitable remedy to avoid the consequences of the application of its own arbitrary rule?

" I say ' novel ' remedy because, in my view, it is impossible to say in such a case that there has been a total failure of consideration.

" My Lords, I do not consider that the answer to these questions is to be found by a minute examination of the precise language used by noble Lords in previous cases in dealing with different facts, but rather by endeavouring to discover the broad general principles of public policy upon which those decisions were based and then applying them to the special creditor and debtor relationship existing between banker and customer. So judged, I can find no valid distinction from the point of view of public policy between the one kind of obligation and the other. Private international law does not sanction the confiscation of enemy debts or property, and to recognize for present purposes a distinction between a current account balance which has been the subject of a formal demand and one which has not would be to sanction a very thinly disguised form of confiscation. On these broad lines I formed the view that this appeal should be dismissed.

" Before parting with this case I would, however, desire to say that I reserve for future consideration the question whether the necessity for demand before action in respect of sums standing to the credit of a customer's current account during the currency of the account, as decided in *Joachimson* v. *Swiss Bank Corporation* [1921] 3 K.B. 110, applies equally in all circumstances to the balance after the account has been closed and thereby ceased to be current.

" In the present case, as the outbreak of war was the event which closed the account, I think that the situation must be viewed as at the moment before war broke out when the account was still current."

Lord Asquith of Bishopstone said: " My Lords, I agree with the opinion just delivered by my noble and learned friend Lord Morton of Henryton.

" The entire case for the appellants would seem to rest on the assumption that the ' accrued rights ' which admittedly survive the frustration of a contract are limited (apart from rights of property) to ' accrued causes of action.' This assumption is, upon the decision of this House in the case of *Schering Ltd.* v. *Stockholms Enskilda Bank Aktiebolag*, [1946] A.C. 219, unfounded. The right to the sum represented by the credit balance on current account outstanding at the outbreak of war was in my view a ' right to . . . a liquidated sum of money, which will be treated as a debt and will survive the outbreak of war ' within the formula adopted by Lord Thankerton from Sir Arnold McNair's Legal Effects of War, 2nd ed., p. 93, and applied by this House in the *Schering* case."

Lord Cohen, after stating the argument of the parties, turned to examine the two cases of *Ertel Bieber & Co.* v. *Rio Tinto Co. Ltd.* [1918] A.C. 260, and *Schering Ltd.* v. *Stockholms Enskilda Bank Aktiebolag* [1946] A.C. 219. He described the issue in the former case, cited passages from the speeches of Lords Dunedin and Sumner, and continued: " Lord Dunedin and Lord Sumner both recognize that there may be accrued rights which are suspended notwithstanding the abrogation of the contract which gave rise to those rights, but Sir Andrew Clark, relying in particular on the language of Lord Sumner, submits that suspension only takes place if the accrued right is an accrued cause of action at the date of the outbreak of war.

" My Lords, the decision in the second case to which I have referred is, I think, fatal to this contention. In *Schering Ltd.* v. *Stockholms Enskilda Bank Aktiebolag* [1946] A.C. 219, the appellants had guaranteed the repayment of part of a debt incurred by a German company to the respondents before the outbreak of war, undertaking to pay the sum so guaranteed by half-yearly instalments over a period of eight years. Some of the instalments remained unpaid at the outbreak of war and the question was whether the appellants' obligation in respect thereof was abrogated or suspended. Your Lordships' House, by a majority, held that at the outbreak of war nothing remained to be done under the contract but to discharge an accrued debt by instalments and that the obligation to pay and the right to recover were only suspended. It is to be observed that none of the instalments in question were due at the outbreak of war and accordingly that it could not be said that there was an accrued cause of action. Lord Thankerton, one of the majority, in the course of his judgment cited passages from the judgments of Lord Dunedin and Lord Sumner in the *Ertel Bieber* case, [1918] A.C. 260, and after expressing the opinion that there was no valid distinction between the case of a contract between a British subject and an enemy subject and the case of a contract between a British subject and a neutral subject, continued [1946] A.C. 219, 240:

> ' I am inclined to agree with Sir Arnold McNair's suggestion (Legal Effects of War 2nd ed., at p. 93), that the distinction between " executed " and " executory contracts " may not be very helpful in this connexion and that it may be found safer to say that . . . the effect of the outbreak of war upon contracts legally affected by it is to abrogate or destroy any subsisting right to further performance other than the right to the payment of a liquidated sum of money, which will be treated as a debt and will survive the " outbreak of war". In this view, I proceed to consider what is included in the phrase, "a liquidated sum of money, which will be treated as a debt". The appellants' counsel admitted that a debt payable by instalments would be so included, and that provision for discount on anticipation of the instalment dates would not alter the position, nor would express provision for the acknowledgment in writing of each sum paid affect the matter.'

" Sir Andrew Clark submitted that the case was not an authority for the proposition that the right to future instalments of a debt was only suspended since that point had been conceded not argued.

I am unable to accept that view of the case. Their Lordships were dealing with a question of public policy and the case must, I think, be treated as a decision of this House that the right to such instalments is only suspended.

" Sir Andrew then argued that be this as it may, there is a vital distinction between a debt payable on demand and a debt payable by instalments on fixed dates since the necessity for demand involves intercourse between enemies. My Lords, I am unable to recognize the validity of this distinction. It is well settled by authority that the basic relationship between banker and customer is that of debtor and creditor. The appellants' right was a right to a liquidated sum the amount of which was ascertained and the consideration for which had been fully given by the appellants. Their right was, I think, clearly an accrued right in the sense in which that term was used by Lord Dunedin in the *Ertel Bieber* case.

" I agree with Jenkins L.J. that the necessity for demand survives the abrogation of the further performance of the contract but should probably be regarded as surviving not by virtue of the contract itself but as a characteristic in the nature of a restriction on its recovery inherent in the debt contracted as a result of the past operation of the contract. Had I taken the alternative view favoured by Singleton L.J., that the necessity for demand disappeared with the contract, I should have agreed with him that none the less the right was an accrued right and that that right was locally situate in Palestine. Sir Andrew argued that once it became unnecessary for his client to make a demand at the Allenby branch it was the duty of the respondents to seek him wherever he might be, and that accordingly the debt, like any other debt, was situate at the chief administrative centre of the respondents, *i.e.*, London. This argument is, I think, fallacious. It was of the essence of the original contract that the debt should be payable at the Allenby Square branch and that Palestine law should govern the obligations of the parties. So long as the appellants have to found their claim on the contract, it must, I think, be regarded as a right situate down to the outbreak of war in Palestine and thereafter in Israel.

" In view of the conclusion I have reached that the right of the appellants to the balance to their credit at the Allenby Square branch was only suspended and not abrogated, it becomes unnecessary for me to consider at length Sir Andrew Clark's alternative argument based on quasi-contract. I would, however, observe that there does not appear to me to have been a total failure of consideration. The consideration for the respondents' right at any given moment to retain the balance to the credit of the appellants was, I think, not only their promise to render banking services in the future but also the services they had already rendered in collecting the items which went to compose the credit balance, "It was for those reasons that I formed the view that the appeal should be dismissed."

[Report: L.R. [1954] A.C. 495.]

War—Effects of—Upon Contracts—The Right to Sue—Persons in Enemy Territory—Non-recognition—Effects upon Application of Law of Unrecognized State—Jordan and Israel—State Succession —Judgments of Courts.

OTTOMAN BANK *v.* JABAJI.

Jordan, Supreme Court of Cassation. July 4, 1954.
(Musmar, President; Saket, Zouaiter, Daoudi, Khoury, Rousan and Salah JJ.)

THE FACTS.—The respondent was a customer of the appellant Bank at their Jaffa branch. In March 1948 he emigrated to Jordan, and became a Jordanian national. In April of that year he attempted through the Amman branch of the Bank to withdraw the moneys standing to his account at the Jaffa branch and to have returned to him certain property which he had deposited there (hereinafter called "the deposit"). The Amman branch refused payment of the money and did not deliver up the deposit, and on April 23, 1948, the Jaffa branch closed its doors until the termination of the British Mandate over Palestine. The respondent sued the appellant Bank for the amount of the current account and the value of the articles deposited.

The Jerusalem Court of First Instance found as facts, *inter alia* that the state of affairs at the Jaffa branch of the Bank between April 20 and April 26, 1948, when it closed its doors, was chaotic. The Jaffa branch was not justified in closing its doors on April 26, 1948, because the British Army and Governmental Administration remained in Jaffa until May 14, 1948, and although telephonic and telegraphic communications were sometimes difficult because of the disturbances, yet they were actually existing between Jaffa and places outside it, especially with Jerusalem and Amman. The Court held that the Jaffa branch had been negligent towards its customers. After an appeal to the Jerusalem Court of Appeal the Bank appealed further, on the grounds, *inter alia*, (1) that the Jerusalem Court of First Instance had no jurisdiction because the transaction from which the litigation arose was effected with the branch of the Ottoman Bank in Jaffa; (2) that the Ottoman Bank was improperly made defendant instead of the branch of the Ottoman Bank in Jaffa, with whom the respondent dealt; (3) that the respondent's action was premature because he did not claim the payment of the balance of his account from the Jaffa branch before bringing his action; (4) that the Court of Appeal was wrong in law in that it did not apply the law of the place of contract, namely, Jaffa;

(5) that despite the non-recognition of Israel, Laws enacted by it which prevented the Bank from paying out on the respondent's account constituted *force majeure*; (6) that the state of war between the Arabs and Jews suspended the respondent's right of suing for his moneys until the end of the war and the restoration of peace; and (7) that the Jaffa branch of the Ottoman Bank was not negligent in closing its doors when conditions in Palestine became so dangerous that it was unable to continue operating.

Held: that the appeal must be dismissed. The Bank had been negligent, and it could not rely on Jewish legislation as *force majeure*. As regards jurisdiction, the Jerusalem Court of First Instance had jurisdiction to hear this case, in accordance with the decision of this Court in *Bahiyet Barakat* v. *Barclays Bank* (*D.C. & O.*) (Appeal Case No. 6/1954) that the Jerusalem Court of First Instance had jurisdiction to hear cases which were originally included in the jurisdiction of the Jaffa District Court. This was by virtue of Proclamation No. 4 issued by the General Military Governor of the Western Side of the Hashemite Kingdom of the Jordan, which proclamation had the force of law in accordance with Article 6 of the Law Amending the General Administrative Law in Palestine, No. 48/1949.

As regards the parties to the case, the Court held that the action was properly brought against the Ottoman Bank seeing that under Article 18, para. 4, of the Companies Ordinance, a company, once it has been registered, obtains a corporate personality and can be sued in this capacity; the Court had so decided in the case of *Bahiyet Barakat* v. *Barclays Bank* (*D.C. & O.*), referred to above.

On the merits of the case the Court said: "The Jerusalem Court of First Instance has found as a fact that the respondent asked the Jaffa branch to transfer the balance of his account to the Amman branch. That was before the termination of the Mandate over Palestine, but the Bank did not accede to his request. The finding of the Court of First Instance was in accordance with the evidence, and we do not see in the appellants' grounds of appeal any reason to interfere with that finding. Consequently, the failure of the Jaffa branch to transfer the moneys to the Amman branch in accordance with this demand is a breach of the terms of the Bank's contract with its customer and it gives to the customer the right to sue the Bank wherever it exists. That is the principle decided in the English cases of *Leader & Co.* v. *Direckion der Disconto-Gesellschaft*, (1914) 31 T.L.R. 83, 464, [decided by the King's Bench Division] and *Rex* v. *Lovitt*, [1912] A.C. 212, decided by the Privy Council.

"Assuming, however, that such a demand was not made, we hold that it was not necessary in this case because the current account contract had been terminated by *force majeure*, namely, the state of war between the Arabs and the Jews. We so decided in the above-mentioned case of *Bahiyet Barakat* v. *Barclays Bank* (*D.C. &*

O.), and we do not consider it necessary to repeat the reasoning on which we relied in deciding this principle.

"As regards the fourth and fifth grounds of appeal, we would agree with the appellants that the law which should be applied in this case is the *lex loci contractus*, but this is the law which was in force in Palestine from the time when the contract was made until the termination of the Mandate. We should not recognize the legislation enacted by the unrecognized Jewish authorities as long as it harms the interests of the subjects of this Kingdom or is against the latter's public policy . . .

" The existence of the state of war between the Arabs and the Jews does not prevent the respondent from suing the appellant Bank before the Courts of this Kingdom, and the right to sue is not suspended until the state of war is over because a subject has the full right to sue any person residing in territory occupied by the enemy if he is able to serve that person: we have so decided in the case of *Bahiyet Barakat* v. *Barclays Bank* (*D.C. & O.*), in accordance with English principles to which we referred in that case.

"As regards the question of negligence, it is established that conditions in Jaffa became so dangerous after April 25, 1948, that it was impossible for any financial institution to operate without endangering its property. It was also established that the officials of the Bank's branch in Jaffa closed the Bank and left Jaffa without attempting to move the deposits to a safe place, although they were aware of the disturbed conditions and the possibility that these deposits were liable to damage and seizure by the enemy.

Consequently, we hold that the Bank was negligent in not moving these deposits from a place of danger to a place of safety, and therefore the Bank must make good this loss in accordance with Article 787 of El Mejelle, which obliges the depositee to make good the loss if the deposit is damaged by his negligence or fault, and in accordance with the terms of the contract, which provide that the Bank shall be held responsible for the deposit in case it is damaged or lost by the negligence of its employees.

"As regards the allegation of the appellent Bank that the deposit is kept at the Bank's branch in Jaffa and consequently the appellants are not obliged to deliver it at another place, this is an allegation which does not affect the right of the respondent to sue for the value of this deposit as long as the Bank admits that it is prevented from delivering it to the owner because of an order issued by the Jewish Authority (which, under the law of this Kingdom, is an illegal authority). Moreover, the Bank is in this position because of its failure to move the deposits outside the boundaries of that Authority."

[Report: Unpublished.]

Effects of Outbreak of War—On Private Contracts—Trading with the Enemy.

See p. 464 (*Kuenigl* v. *Donnersmarck and Another*).

iv.—On Enemy Subjects with regard to—

(b) THEIR PROPERTY AND OTHER RIGHTS.

War—Effects of Outbreak of—On Enemy Subjects with regard to their Property—Sequestration of Business—Nature of—Duty of Administrator-Sequestrator—Expenses of Sequestration.

See p. 141 (*Schappe Spinning Mill Claim*).

vii.—Trading with the Enemy

Trading with the Enemy—Effect of Vesting of Property in Custodian—Whether Actions in Tort in respect of Property Maintainable by Former Owner Without Participation of Custodian—Actions for Conversion, Breach of Trust, and Declaratory Relief—Trading with the Enemy Act, 1939—Distribution of German Enemy Property Act, 1949.

MAERKLE AND ANOTHER *v.* BRITISH CONTINENTAL FUR CO. LTD.
MAERKLE *v.* THE SAME.

England, Court of Appeal. July 26, 1954
(Jenkins and Hodson L.JJ.)

THE FACTS.—The two plaintiffs in the first action were German nationals carrying on business in partnership at Leipzig at the outbreak of war. The first plaintiff in that action was the sole plaintiff in the second. In the first action the plaintiffs alleged that the defendants, as their London agents, had purchased in 1939 a number of Persian lamb skins for the account of the plaintiffs for which the plaintiffs had paid. Subsequently, it was alleged that the defendants had sold the skins in Canada and had accounted to the Canadian Custodian of Enemy Property for $59,000, whereas the price for the skins was in fact $79,000. The plaintiffs claimed on account of all sales of the skins, damages for breach of trust, for the breach of the contract of bailment and in conversion and, further, a declaration that the defendants had not truly accounted to the Canadian Custodian of Enemy Property in respect of the sale of the skins. In the second action the plaintiff alleged that the defendants had in 1935 received moneys for the use and benefit of the plaintiff, and as trustee for him, and that the defendants in the accounts which they had rendered showed a number of payments amounting to £7,199.6s.6d. as having been made which, in fact, had not been made, or that the payments had been made fraudulently. The plaintiff claimed damages for conversion or breach of trust, a declaration that the defendants had converted the sum of £7,199.6s.6d. to their own use and an order requiring the defendants to pay that sum to the Custodian of Enemy Property in the United Kingdom. On the application of the defendants, Wynn-Parry J. made orders in both actions striking out the two statements of claim.

On appeal,

Held: (1) that there might be claims in tort of certain kinds, the rights of action in respect of which would not vest in the Custodian of Enemy Property under the trading with the enemy legislation, but the rights in question in the two actions were essentially proprietary in their origin, arising as they did out of contracts or trusts which conferred interests in the nature of property upon the plaintiffs, and that such claims were caught by the legislation, and that the claims of the plaintiffs were maintainable by the custodian and by no one else.

(2) That the actions should not be allowed to go forward for the purpose of obtaining declaratory relief in proceedings to which the custodian was not a party; that such relief could confer no tangible benefit on the plaintiffs and might be productive of embarrassment as between the defendants and the custodian in any litigation or negotiation which might thereafter take place between them upon the subject-matter of the two actions.

Jenkins L.J. said: " These are appeals from two orders of Wynn-Parry J. made on May 20, 1954, ordering the statement of claim in each of the two actions to be struck out as disclosing no reasonable cause of action.

" The question in each case is the same, namely, whether the subject-matter of the claim has become vested under the trading with the enemy legislation in the Custodian of Enemy Property, with the result that the actions are not maintainable by the plaintiffs. [His Lordship stated the facts and continued:] The objection taken by the defendant company to the statements of claim (the objection which succeeded before the judge) was that the subject-matter of the claim in both cases was vested in the Custodian of Enemy Property, so that the plaintiffs were not in a position to maintain any action in respect of those claims.

" The judge in the course of his judgment, fully reviewed the relevant statutory provisions bearing upon the vesting of what may be compendiously described as enemy debts. His review was, I think, accepted by Mr. Campbell for the plaintiffs as an adequate review of the relevant provisions, although he joined issue with the judge as to the effect of those provisions in their application to the claims here in question.

"After referring to the various statutory provisions the judge said: 'Upon that review of the relevant statutory provisions it appears to me to follow inevitably that as between the respective plaintiffs on the one hand, and the defendants on the other hand, the plaintiffs have ceased to have any interest whatsoever in the property which was the subject-matter of the transactions referred to in the respective statements of claim and that as between the plaintiffs on the one hand, and the Custodian of Enemy Property on the other hand, their interest consists only of the right to participate in any distribution or distributions which may hereafter be made under the provisions of the Distribution of German Enemy Property Act, 1949, the Custodian of Enemy property having the duty (to the exclusion of the plaintiffs) of swelling the funds at his disposal by pursuing any rights which the respective plaintiffs had against the defendants in regard to the property the subject-matter of the transactions in the respective statements of claim as he may be advised.'

" Mr. Campbell submitted that, comprehensive as the language of these statutory provisions may be, some limit must, nevertheless, be placed upon that language as regards the character of the property to which it applies, and he said that the claims to which these two actions relate are not property of such a character as to be caught by the vesting provisions in this legislation. He submitted that the sums claimed are in the nature of damages for tort; he said that they are personal claims, and at one stage in his argument he contended that they were not assignable. I cannot accept Mr. Campbell's argument. It may be that there are claims in tort of certain kinds the rights of action in respect of which would not vest in the custodian. That may well be so, but the rights here in question seem to me to be essentially proprietary in their origin, arising, as they do, out of contracts or trusts which conferred interests in the nature of property upon the plaintiffs. It seems to me that claims of this kind are clearly such as to be caught by the legislation.

" I am fortified in that view by the very wide definition of 'property' contained in the Trading with the Enemy Act, 1939, s. 7 (8) (b), which is in these terms: 'The expression " property " means real or personal property, any negotiable instrument, debt, or other chose in action, and any other right or interest, whether in possession or not.' I hope I will not be regarded as being disrespectful to Mr. Campbell's argument if I do not go in detail through the provisions which were carefully reviewed by the judge; I am content to adopt his view of the legislation and his conclusion as to its effect in the present cases.

"A second argument of Mr. Campbell should be dealt with, and that was this, that even if these rights or claims were vested in the custodian the plaintiffs were, nevertheless, entitled to maintain the first action for the purpose of obtaining a declaration in the form set out in paragraph 6 of the prayer to the statement of claim. In support of that contention (which by parity of reasoning was equally applicable to the declaratory relief sought in the second action) Mr. Campbell relied on the case in the Court of Appeal of *Guaranty Trust Co. of New York* v. *Hannay & Co.* [1915] 2 K.B. 536. That was an entirely different kind of case, but it was cited by Mr. Campbell as authority for the proposition that a declaration can be made even though the party seeking it has no cause of action against the party against whom the declaration is sought. The case was of this nature: The defendants brought an action against the plaintiffs in America to recover the amount of a bill of exchange paid by the defendants in reliance on a forged bill of lading. It was admitted that the law of England applied to the case. The plaintiffs brought an action in England claiming a declaration to the effect that they did not, by presenting the bill of exchange for acceptance with the bill of lading attached, represent that the bill of lading was genuine, and that they were not bound to repay the amount of the bill of exchange; and it was held by the majority of the court that the plaintiffs' claim for a declaration in those terms was free from objection, although they had no cause of action against the defendants in the proceedings in which the declaration was claimed.

"That is an entirely different case from the present one, and although it is authority for the proposition that in some cases a declaration may be made, although the party seeking it has no cause of action, it by no means follows that in every case where a party has no cause of action he can maintain a claim for a declaration.

"In dealing with this part of Mr. Campbell's argument, the judge seems to have misapprehended some observations which Mr. Settle, for the defendants, attributed to himself. The judge treated this claim for a declaration as made with a view to assisting possible proceedings in Germany, or any proceedings that were contemplated in Germany, by the plaintiffs. In fact, as I understand the position, there never was any intention on the part of the plaintiffs to take any such foreign proceedings. Except for his reference to foreign proceedings, the judge gave no reason for refusing the plaintiffs' claim to declaratory relief. The granting of such relief, as the only relief in an action, is always a matter for discretion, and it has been said, I think, that such discretion should be sparingly exercised.

"In the present case, treating the matter as res integra, I cannot think that it would be right to allow either of these actions to go forward for the purpose of obtaining declaratory relief of the kind sought. If it is the case that the whole of the plaintiffs' right, title and interest in the subject-matter of these actions has passed to the custodian, then the claims which the plaintiffs now seek to assert are, in truth, claims maintainable by the custodian and no one else, against the defendants, subject to whatever defences the defendants may have. They are claims which the custodian may, or may not, see fit to litigate between himself and the defendants;

they are claims which might, or might not, be compounded or compromised between the defendants and the custodian.

" In those circumstances, I cannot think that it would be right to allow either of these actions to go forward for the purpose of obtaining declaratory relief in proceedings to which the custodian is not a party. The plaintiffs' interest in such relief could only be described as nebulous, for the only advantage (if one may call it such) that Mr. Campbell claims might be achieved by such relief is that it might increase the prospect of his clients ultimately participating in any surplus that the custodian might have on hand after all prior claims had been disposed of. That, Mr. Campbell admitted, is no more than a spes; it is not a right or enforceable interest; it is at most a possibility. I cannot therefore think that it would be right to allow these actions to go forward merely for the purpose of obtaining relief of that kind, which could confer no tangible benefit on the plaintiffs, and might be productive of much embarrassment as between the defendants and the custodian in any litigation or negotiations which may hereafter take place between them upon the subject-matter of these two actions."

[Report: [1954] 1 W.L.R. 1242.]

Trading with the Enemy—Effect of War on Contracts.

See below (*Kuenigl* v. *Donnersmarck and Another*).

VI.—Enemy Character

ii.—Of Corporations

Enemy Character—Of Corporations—English Company with Directors in Enemy Territory—Contract Made for Company by Agents in Enemy Territory—Whether Contract the Act of the Company—Difference between Contracts Suspended and Contracts Abrogated by War—Whether Doctrines of Severance Applicable —Purported Ratification after War.

KUENIGL *v.* DONNERSMARCK AND ANOTHER.

England, Queen's Bench Division. December 3, 1954.
(McNair J.)

THE FACTS.—The plaintiff was an Austrian national who in 1920 had married into the Austrian von Donnersmarck family. The first defendant, Count Alfons von Donnersmarck, had in 1921 inherited, as universal heir, the Donnersmarck estate, including certain valuable mines in Upper Silesia. The second defendant was a corporation which the family, because of the political uncertainties of the time, had caused to be incorporated in England, and to which the mines had been transferred. The registered office of the company was at all material times in London, but up to the outbreak of war in 1939 eight of the directors, who held most of the shares, were resident in Germany, two others in the United Kingdom and one in Belgium. Between 1926 and 1931 the corporation transacted business in the United Kingdom, but up to the outbreak of war the management and control of its affairs were exercised from Germany.

In 1923, the plaintiff took over by assignment certain claims against the first defendant arising out of his deceased father's estate. In 1929, those claims were compromised in an agreement between the plaintiff, the first defendant and the company, whereby the first defendant agreed to pay to the plaintiff certain annual sums in gold marks, payable quarterly, for 15 years, the company guaranteeing the payments. Litigation in the Austrian courts followed, but in 1939 the parties made another compromise agreement, whereby the 1929 agreement was varied on terms unfavourable to the plaintiff. In 1940 the parties, by the legal advisers in Germany, made yet another agreement intended to replace the 1939 agreement.

In 1950 the plaintiff began the present proceedings against the first defendant as principal creditor and against the company as guarantor, claiming sums alleged to be due under the original agreement of 1929. The defendants relied in their defence on the agreements of 1939 and 1940. The plaintiff argued in reply that the 1940 agreement could not be regarded in Engish law as the agreement of the company because, after the outbreak of war on September 3, 1939, the company's directors or agents in Germany ceased to have any authority to act for the company. The company rejoined that, for all purposes connected with trading with the enemy, it was to be regarded as a person in Germany, and that therefore its directors' contracts of agency were not abrogated, for under them no intercourse or benefit could take place or was required to take place across the line of war.

Held: that judgment must be given for the plaintiff. The company had enemy character, but it did not cease to be an English company because it was under enemy control. Consequently, the authority of its agents in enemy territory was automatically terminated on the outbreak of war. Therefore the agreement of 1940 was not the agreement of the company.

The 1939 agreement had not come into effect as certain conditions precedent were never fulfilled; but in any case it would have been abrogated by the war. Moreover, the doctrine of severance cannot be applied to contracts offending against trading with the enemy laws.

McNair J. stated the facts, explained why the agreements of 1939 had not come into effect owing to the non-fulfilment of certain conditions precedent, summarized the further contentions of the parties, and continued: " I propose first to deal with the contention that the defendant company is to be treated as a person resident in Germany and not in England. [His Lordship then described the incorporation and pre-war activities of the company as set out above, and continued:] On these facts I find that the defendant company was, in the eyes of English law, a company having enemy character on the principles laid down in *Daimler Co. Ltd.* v. *Continental Tyre and Rubber Co.* (*Great Britain*) *Ld.* [1916] 2 A.C. 307. On this state of facts and finding it was argued by counsel on behalf of the defendants that for the purposes of the common law prohibition against trading with the enemy the company must be treated as being in Germany and not in England. In support of this argument reliance was primarily placed upon two passages in the opinions of Lord Simon and Lord Wright in *Sovfracht* (*V.O.*) v. *Van Udens Scheepvaart en Agentuur Maatschappij*, [1943] A.C. 203.[1]

"Lord Simon laid down the following propositions: '1. The test of "enemy character" is fundamentally the same whether the question arises over a claim to sue in our courts, or over issues raised in a court of prize, or over a charge of trading with the enemy at common law. 2. The test is an objective test, turning on the relation of the enemy Power to the territory where the individual voluntarily resides or the company is commercially domiciled or controlled. It is not a question of nationality or of patriotic sentiment.' Lord Wright is reported as having said: 'Before examining the relevant authorities I should explain that the test which has been taken of enemy character in English law is not nationality but domicile in the sense of settled residence or in the case of traders commercial domicile. . . . However, the right to sue or prosecute an action in court, the right to claim to be exempt from seizure and condemnation in prize, the liability to punishment for the offence of trading with the enemy, all depend alike on whether the person has enemy character in what has been called the technical or territorial sense.' In parenthesis I should observe that in this passage Lord Wright is clearly (as was Lord Simon expressly) dealing with the position at common law, since by section 2 of the Trading with the Enemy Act, 1939, 'enemy' is expressly defined to mean, *inter alia*, '(d) any body of persons constituted or incorporated in, or under the laws of, a State at war with His Majesty.'

"In my judgment it is clear that Lord Simon and Lord Wright in these passages, so far as they deal with the law as to trading with the enemy, are propounding the test to be applied in determining whether such a company is a person with whom a person subject to English law may without offence trade. They are merely restating in their own words the third proposition propounded in Lord Parker's opinion in the *Daimler* case in the following passage: '(3) Such a company'—that is a company incorporated in the

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[1 See *Annual Digest*, 1941–1942, Case No. 165.]

United Kingdom— ' may, however, assume an enemy character. This will be the case if its agents or persons in *de facto* control of its affairs, whether authorized or not, [are] adhering to the enemy or taking instructions from or acting under the control of enemies. A person knowingly dealing with the company in such a case is trading with the enemy.' I emphasize the last sentence.

" Neither of these passages in Lord Simon's or Lord Wright's speeches is dealing with the question which I have to deal with, namely, whether an English company found to have enemy character by reason of enemy control ceases to be in the eye of the English law an English company and subject to the prohibition which English law imposes on persons subject to that law. On this question there is, so far as I know, no direct authority, but such authority as there is in my judgment strongly suggests a negative answer. In *Elders & Fyffes Ld.* v. *Hamburg Amerikanische Packetfahrt Actien Gesellschaft*, (1917) 34 T.L.R. 4, Bray J. made the following comment upon Lord Parker's opinion to which I have just referred, namely, that ' Lord Parker only decided that by certain conduct an English company might become an enemy company. He did not say that it would thereby cease to be an English company.' With this judgment Swinfen Eady L.J. expressed his entire agreement, though his judgment proceeded upon different findings of fact from those adopted by Bray J. In *The Unitas* [1948] P. 205 [1] Lord Merriman P. declined to apply the principle of the *Daimler* case in reverse in favour of a claimant in prize so as to convert a German registered company into an allied company by reason of its control from Holland. Further, I am aware of nothing in Lord Parker's formulation of the *Daimler* case or in any later application of that test which involves the conclusion that the acquisition of enemy character by a corporation implies the loss of the national character of that corporation. Enemy character is not substituted for the original character, but is something added to it. An English company which has acquired enemy character continues to owe its existence to English law (under which it was incorporated) and remains subject to all its obligations towards the Crown under the Companies Acts as an English company. It would, in my judgment, be absurd that the acquisition of enemy character should release it from the obligations attaching to an English company and enable it to do lawfully things which an English company not possessing enemy character was lawfully unable to do.

" I can derive little, if any, assistance in the solution of the problem which I have to solve from cases dealing with the residence of English companies for the purpose of income tax, such as *Swedish Central Railway Co. Ld.* v. *Thompson*, [1925] A.C. 495, and *Egyptian Delta Land and Investment Co. Ld.* v. *Todd*, [1929] A.C. 1, but the

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[[1] See *International Law Reports*, 1950, Case No. 120.]

decision of MacNaghten J. in *Gasque* v. *Inland Revenue Commissioners* [1940] 2 K.B. 80 supports the conclusion that the domicile of a limited company (which is of particular relevance here) is the place of its registration and that this domicile clings to it throughout its existence. This, apparently, is also the position under American law: *Berger and Engel Brewing Co.* v. *Dreyfus* (1898) 70 Am. St. Rep. 251, (a decision of Holmes J.) referred to in the judgment of MacNaghten J. See, too, Dicey's Conflict of Laws, 6th ed. r. 18: ' The domicile of a corporation is the country in which it is registered. If it is not required in law to be registered, its domicile is in the country by the law of which it is incorporated.' I think that it is also clear that, in so far as nationality can by analogy be applied to a juristic person, its nationality is determined in an inalienable manner by the laws of the country from which it derives its personality: see *Janson* v. *Driefontein Consolidated Gold Mines Ld.*, [1902] A.C. 484, 505 per Lord Lindley; *Gasque* v. *Inland Revenue Commissioners* [1940] 2 K.B. 80; Halsbury's Laws of England, 3rd ed., vol. 9, p. 19.

" In my judgment it would be contrary to principle and to public policy as embodied in the trading with the enemy law to hold that a company incorporated under the laws of this country and registered here, and so having both English domicile and British nationality, can cease to be in the eye of English law an English company subject to English law by reason of the fact of enemy control. Enemy control may operate to the prejudice of an English company by conferring upon it enemy character, but cannot confer benefit upon it exonerating it from the operation of English law. Could it be said that this English registered company could lawfully by English law, merely because it had acquired enemy character by means of enemy control, have, during the war, entered into contractual relations to supply a German armament firm with coal from its Beuthen mines, or that it could after the war ask the English courts to give effect to such a contract? Plainly not.

" It follows from the conclusion stated above, first, that as a company can only act through directors or other agents, the authority of the defendant company's directors and other agents in enemy territory was automatically determined on the outbreak of war: see *Daimler Co. Ld.* v. *Continental Tyre and Rubber Co.* (*Great Britain*) *Ld.*, [1916] 2 A.C. 307, *per* Lord Atkinson, Lord Shaw and Lord Parker. From this it results that in English law (1) no act purported to have been performed in Germany on behalf of the company can be taken to be the act of the company, and (2) no agreement made by persons in Germany purporting to act on behalf of the company can be taken to be the agreement of the company. Without doubt, therefore, the 1940 agreement is not to be taken as the agreement of the company.

" It remains for consideration what effect, if any, the conclusion stated above has upon the fate of the 1939 agreement. It is conceded, or, if not conceded, is in my judgment clear in principle, that in so far as the 1939 agreement was executory on the outbreak of war it would be abrogated at least if its performance necessarily involved intercourse or communication across the line of war or benefit to the enemy. To state the proposition in this form is probably to state it too favourably for the defendants, since in *Ertel Bieber & Co.* v. *Rio Tinto Co. Ld.* [1918] A.C. 260, Lord Dunedin states the proposition in the following terms: ' From these cases I draw the conclusion that upon the ground of public policy the continued existence of contractual relations between subjects and alien enemies or persons voluntarily residing in enemy country which (1) gives opportunities for the conveyance of information which may hurt the conduct of the war, or (2) may tend to increase the resources of the enemy or cripple the resources of the King's subjects, is obnoxious and prohibited by our law. ' I am, however, for present purposes only, prepared to apply the narrower proposition.

" Did, then, the performance of the 1939 agreement (assuming, contrary to my earlier findings, that it ever came into effect) necessarily involve intercourse or communication across the line of war or benefit to the enemy? It was an essential part of the agreement that litigation to resolve the reserved questions should be prosecuted between the company and the plaintiff in the German courts; it was clearly impossible to perform this part of the contract without intercourse: for the company could take no part in such litigation except through its agents, and agency necessarily involves intercourse. Furthermore, (1) clause 1 of the agreement expressly provides for payment by the defendant company of certain fees to the German Receiver in Bankruptcy; (2) the implementation of the agreement would have resulted in the discharge of the first defendant, a person at all material times resident in enemy territory, and (3) the payment by the company's erstwhile agents in Germany of 160,000 reichsmarks would diminish the resources of the English company, quite apart from the fact that it was clearly contemplated that, if not the whole, at least a large part of the 160,000 reichsmarks would be paid to the plaintiff's creditors in Germany. There was necessarily, then, both benefit to the enemy and detriment to the resources of the King's subjects, as well as intercourse and means of communication.

"As to the argument advanced that it is possible to sever from the 1939 agreement those provisions which offend from those which are innocent, two answers may properly be made. First, that there is no authority for the proposition that for the purpose of the matter under consideration severance can ever take place and no ground of public policy which requires such severance. The decisions relating to severability of covenants in restraint of trade, such as *Putsman*

v. *Taylor* [1927] 1 K.B. 637, 741, 392, seem to me to have no application at all in the present context. Secondly, that severance can only take place, if at all, if the part which it is sought to sever stands by itself supported by separate consideration. This is not the case here. The offending provisions to which I have referred are not supported by separate consideration but are inextricably interwoven with the other promises in the agreement.

"A more refined argument was, however, presented by counsel for the defendants upon the basis of the decision in *Schering Ld.* v. *Stockholms Enskilda Bank Aktiebolag*, [1946] A.C. 219[1]. This proceeded on the following lines: (1) If no agreement had been entered into in 1939 the obligations of the defendant company as guarantors towards the plaintiff under the 1929 agreement would not on the outbreak of war have been abrogated but would merely have been suspended, since on that assumption the plaintiff would have wholly executed his part and payment of money by instalments alone remained to be performed by the first defendant under the guarantee of the defendant company; (2) the 1939 agreement provided merely a method of discharge of the existing obligation to pay money by instalments and if it had become effective before the outbreak of war it similarly would have been suspended and not abrogated; and (3) it makes no difference that the 1939 agreement only became effective after the outbreak of war.

"I have found great difficulty in finding in the *Schering* decision (which, as Lord Porter says, was a very special decision) any support for these propositions or any analogy with the present case. But one essential difference is that the obligation under consideration in the *Schering* case involved no intercourse across the line of war, whereas the resolution of the reserved questions by litigation in the German courts between the English company and the plaintiff would (as has already been noted) necessarily involve intercourse between the English company and their legal advisers acting upon their behalf in that litigation. Furthermore, in my judgment the analysis set out in the three propositions referred to above is not accurate. The 1939 agreement did not merely provide a method of discharging an accrued right; if implemented it would (1) have created a new obligation to pay not gold marks but reichsmarks, (2) have substituted the defendant company for the first defendant as principal debtor and (3) have discharged the first defendant.

"Up to this point in my judgment I have considered only the impact of the common law rules as to trading with the enemy, but seeing that effect of the Trading with the Enemy Act, 1939, was also argued before me, it is right that I should shortly state my conclusions on this aspect of the matter. Having reached the conclusion

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[[1] See *Annual Digest*, 1943–1945, Case No. 105.]

that the defendant company, though acquiring enemy character, retained English domicile and nationality and did not cease to be in the eye of English law an English company subject to English law, it is clear that it remained subject to all the prohibitions imposed by section 1 of that Act to the same extent as a British subject residing in Great Britain. But even if its position is to be equiparated to that of a British subject voluntarily resident in Germany, I am by no means satisfied that it would be freed from the prohibitions imposed by the Trading with the Enemy Act. Many of the old decisions dating from a more liberal age which suggest that British subjects in enemy territory enjoy a measure of freedom of action in their dealings with the enemy are of doubtful authority to-day.

"As to the contention that after the end of the war the defendant company ratified the 1940 agreement and adopted the payments made thereunder, the short answer in my judgment is that no one can ratify an agreement or adopt an act which could not lawfully have been made or done at the time when the agreement was purported to be made or the act to be done on behalf of the person ratifying."

[Report: [1955] 1 Q.B. 515.]

XII.—Termination of War

War—Termination of—Unconditional Surrender—Effect of.

See p. 473 (*Framnaes Shipyards Inc.* v. *Norwegian State* (*Ministry of Industry*)).

XIII.—Effects of Treaties of Peace

iii.—*Postliminium*

Warfare on Land—*Postliminium*—Pillage in Hungary of Property of Hungarian Jews—Recapture of Property by Allied Military Forces—Restitution to Appropriate Jewish Organization—Claim to Restitution by Owner—Distinction between War Booty and Pillage—Jewish (Rabbinic) Law.

LANDSMAN *v.* MOUNT ZION COMMITTEE.

Israel, District Rabbinical Court (*Beth Din*) *of Jerusalem.*
September 20, 1954.

THE FACTS.—During the Second World War the Hungarian Nazis looted a religious appurtenance, namely, the silver crown of a Scroll of the Law, belonging to the plaintiff, in the course of a general pillage of Jewish property in Hungary. It appears that after the War the custody of the crown was assumed by the Jewish Joint Distribution Committee, a Jewish philanthropic organization whose headquarters are in the United States. The Joint Distribution Committee, being unable to determine the ownership of the article after a period of two years, handed it to the Israel Government, which placed it in a sanctuary on Mount Zion in Jerusalem. There it was seen by the plaintiff (who had, in the meantime, immigrated into Israel) and he claimed its restitution. As is customary in this type of case, the issue fell to be tried, by consent, not by the civil courts but by the Rabbinical Court applying Jewish (Rabbinical) law. The original ownership was not disputed, but the defendants argued that the original ownership had lapsed as a result of the events of the War, so that the defendants had a good title under the provisions of Jewish law relating to salvage of abandoned property. The principal issue was the effect of the pillage on the owner's title, and whether the owner could be regarded as having abandoned hope of recovering his property. This raised the question whether the pillage could be regarded as war booty, in which case the title would have been lost.

Held: that this was not war booty and that the owner had not lost his title. Therefore the property must be restored.

The Court said: " This case has nothing to do with booty of war. The Hungarian Nazis simply laid their hands upon the property of every and any Jew living in Hungary, robbing them of everything. This is no war booty, but simple theft. And when this property subsequently came into the possession of United States occupying forces, no question of title by booty of war could arise, for those forces had no intention of taking advantage of the salvaged articles, but merely collected them together so as to hand them to the representative of the Jews . . .

[The issue before the Court resembled that described by Rabbi Asher ben Yehiel (d. 1327), who, in a comment on the *Talmud*, distinguished between measures applicable to all the inhabitants of a country, and those not applicable to all the inhabitants of a country. These latter measures did not come within the scope of the Rabbinical rule that " the law of the land is law " so as to affect the title to property expropriated by discriminatory acts, even where the rightful owner had given up hope of recovery. The Court continued:] " Furthermore, according to information received from the Joint Distribution Committee, it may be assumed that the organization which received the religious appurtenances rescued by the American Army had no intention of depriving their rightful owner of them. They received the articles in order to return them to their owners, and retained them for two years hoping they would be claimed in that period . . ."

[Report: *Piskei-Din shel Batei ha Din ha Rabaniim ha Ezoriim be Israel* (Judgments of the District Rabbinical Courts in Israel), vol. 1, p. 169.]

NOTE.—This case shows how the concept of *postliminium* is not restricted only to Roman law, but exists in a system of law which has never in its history had direct intercourse with Roman Law.

War—Effects of Treaty of Peace—*Postliminium*—Treaty of Peace with Japan, 1951.

See p. 105 (*Japan* v. *Kulikov*).

B—WARFARE ON LAND

II.—Appropriation, Utilization and Destruction of Enemy Property

Warfare on Land—Appropriation of Enemy Property—Booty—Ships as Booty—Necessity for Unconditional Surrender—Extinction of Private Rights in Property Taken as Booty—Necessity for Prize Proceedings.

FRAMNAES SHIPYARDS INC. *v.* NORWEGIAN STATE (MINISTRY OF INDUSTRY).

Norway, Court of Oslo. December 10, 1949
Supreme Court. April 27, 1954.

THE FACTS.—The *Kattegat* was a German supply ship under the command of the German navy. The *Espana* was an auxiliary vessel under German command. Apparently, both had been previously requisitioned by the German authorities. At the time of the unconditional surrender of the German forces in Norway, the two ships were lying in the yards of the plaintiff, where they were undergoing repairs. After the Armistice, they were taken by the Norwegian Forces as booty of war. The plaintiffs, in an action against the Norwegian State, claimed a lien on the ships to secure payment for the work undertaken while the ships were in the possession of the German armed forces. The defendant maintained that the ships were German Government ships; that they were therefore liable to be condemned as booty of war; that the capitulation, in this respect, had the same effect as if the ships had been captured; and that all private rights whether *in personam* or *in rem* were extinguished by the capture of the vessels in consequence of the unconditional surrender.

Held: (by the Court of Oslo): that the State must succeed.

The Court said: " The Court agrees with the defendant in the proposition that all private rights in the vessels are extinguished if the vessels are taken as booty of war. The effects are in that respect the same as if the ships had been condemned as good prize after prize court proceedings. This applies also to possible liens. Probably nobody would contest this proposition in regard to articles of war properly speaking. If that were not so, the rules concerning booty of war would have no meaning. The Court holds that the same rule must apply also to vessels which on account of their character could be taken as prize even though they were not men-of-war in the strict sense, *viz.*, ships which according to international law are characterized as State ships. As far as such ships are concerned, the Court holds that a judgment of a prize court is not necessary. The effects which would have followed from a prize court judgment follow *ipso facto* from a seizure as booty. The Court refers to Oppenheim, *International Law*, vol. II, 6th ed., pp. 368 ff. It is emphasized there that a judgment by a prize court is necessary for private vessels, but that ' the effect of seizure of public vessels is their immediate and final appropriation '. Certain writers hold the opinion that prize court proceedings are necessary even for State ships, but the Court agrees with Oppenheim."

[The Court then discussed the ownership of the vessels before they were taken into the service of the German forces, and held that it was possible that the Germans had intended to requisition the vessels for use and not for ownership, but that this question was without relevance for the question at issue, *viz.*, whether the ships were public ships. The Court continued:] " The *Kattegat* was under the command of the German Navy and was used as a supply ship from the very beginning of the war. As far as the *Espana* is concerned . . . it was used as a " Hilfsbeischiff " (auxiliary vessel) under the command of "Armeoberkommando Norwegen " (Norwegian Supreme Command). Even if the Court were to base its decision on rules of immunity valid in time of peace, these vessels would have to be regarded as State ships in the sense of international law. The vessels were used by military authorities and for military purposes, *i.e.*, in a public and not in a commercial capacity. The Court finds support for that view in Oppenheim, *op. cit.*, vol. I, pp. 665 ff., and in a decision of the Supreme Court of Sweden of March 17, 1942.[1]

" The taking of booty is without any doubt a hostile act. This does not, however, signify that the vessels cannot be considered as booty of war because they were not captured before hostilities had ceased. If an armistice had been concluded there would not, if a special stipulation had not been made to that effect, have been any question of considering material of war as booty of war. The situation is, however, different in a case of a military capitulation. A capitulation is a surrender which normally has the result that personnel become prisoners of war, and war material booty. The Court holds that such a surrender of material and personnel took place in Norway."

On appeal,

Held (by the Supreme Court, *per* Thrap J.—three Judges concurring, Berger J. dissenting): that the appeal must be dismissed.

[[1] See *The Rigmor* (*Annual Digest*, 1941–1942, Case No. 63). The *Rigmor* was one of a series of identical claims decided in favour of the Norwegian Government by the Supreme Court of Sweden on March 17, 1942.]

The Court said: " I hold, like the Oslo Court, that the State must be upheld in claiming that any lien which the Company may have held [the Court did not find it necessary to decide whether the Company had in fact held a lien before the capitulation] in regard to the Germans became extinct when the vessels were taken as booty of war. Both vessels must be held to have been German State ships at the time of the liberation. They were employed by the German Navy during the war; they were used as auxiliary vessels in the Navy and flew the " Reichsdienst " (Reich service) flag. By the very fact that the vessels were German State ships they became, as the result of the unconditional surrender of the Germans, booty of war for the benefit of the Allies *ipso facto* without any prize court judgment. Not only the rights of the previous owner were extinguished by the surrender, but also all other private rights in the vessels whether they belonged to Norwegian citizens or not and irrespectively of whether they were connected with possession or not."

[Report: *Rt.*, 1954, p. 451.]

III.—Occupation of Enemy Territory

i.—Nature and Effects of the Occupation

Occupation of Enemy Territory—Effects of Occupation—Treatment of Private Property—Whether Occupied State Responsible for Taking of Property by Occupant.

See p. 55 (*Socony Vacuum Oil Company Claim*).

Belligerent Occupation—Effects of—Legislative Measures of Occupant—Responsibility of Occupied State after Liberation.

See p. 141 (*Schappe Spinning Mill Claim*).

Belligerent Occupation—Nature of—Government-in-Exile—Legislation of—Validity of.

See p. 25 (*Ammon* v. *Royal Dutch Company*).

Belligerent Occupation—Nature and Effects of—After Unconditional Surrender—Surrender of Japan at End of Second World War.

See p. 105 (*Japan* v. *Kulikov*).

ii.—Legislative, Judicial and Administrative Functions of the Occupant

Belligerent Occupation—Legislative Acts of Occupant—Validity of—Currency Reform in Germany Following Unconditional Surrender—Conversion into New Type of Currency Not an Unlawful Confiscation under the Law of the United States of America.

EISNER *v.* UNITED STATES.

United States, Court of Claims. January 5, 1954.

THE FACTS.—The plaintiff, a citizen of the United States, brought this action for compensation for what she asserted to have been the taking of her property. The alleged taking was the conversion, by an order of the American Military Commander in Berlin in 1948, of her deposit in a bank in Berlin of 45,263.60 German Reichmarks into 2,263.20 Deutche Marks, a new type of currency, at the rate of one for twenty.

Upon the unconditional surrender of Germany in 1945, banks in Berlin were not allowed to reopen, so far as old accounts which antedated the occupation were concerned. This was apparently a consequence of the close relationship between the banks in the Russian Sector of Berlin and those in the Western Sectors and of the inability of the four Commanders in the Control Council to agree upon a course of conduct. On June 24 and July 4, 1948, the Commandants of the three Western Powers in Berlin issued Ordinances for Monetary Reform as part of the programme of currency reform carried out in the Western Zones of Germany. Persons were required to surrender their old currency and to accept in exchange the new currency, Deutsche Marks, in general in the proportion of one Deutsche Mark for ten Reichmarks. Pre-occupation bank accounts, however, remained blocked and unavailable until December 23, 1949, when the Commandant of the United States Sector of Berlin issued Regulation No. 19, authorizing the conversion of deposits made before May 9, 1945, at the rate of one Deutsche Mark for twenty Reichmarks, if the owner of the deposit was on October 1, 1949 ,a national of the United Nations. The plaintiff accepted the payment in Deutsche Marks but reserved her right to make a further claim for her alleged loss.

On the Government's motion for summary judgment,

Held: that the Government's motion for summary judgment must be granted and the plaintiff's petition dismissed. The Occupying Powers had authority to establish a rational monetary system in Germany. Since the plaintiff's claim against the bank may have been virtually worthless, she was unwarranted in contending that the payment in Deutsche Marks constituted only one-twentieth of the value of her original claim against the bank.

The Court said: " . . . The task of occupying powers in a great and complex country such as Germany, whose own Government had completely collapsed, was an almost insuperable one. Certainly it included the power to establish a rational monetary system. The difficulties of such a reform were so great that it was long, perhaps too long, delayed. But until a stable currency was established, economic recovery lagged, the population suffered, and the financial burden upon the occupying powers continued. The hoped-for benefits of the currency reform were realized almost at once. Like any other fundamental change of law or Government policy, it brought hardships to some people. Such hardships cannot, of course, be regarded as creating claims against the Government, else all legal change would become fiscally impossible.

" Our officials in Germany, in consultation with our Allies and with the Germans, worked out the difficult problem of currency reform as best they could. It seems to us that they might have treated the pre-occupation claims against Berlin banks as worthless, and given them no conversion value in the new, sound currency. The banks were no doubt full of bonds of the Hitler Government which were worthless; such other securities as still had a nominal value may well have been on deposit in a branch in the Russian Sector of Berlin completely beyond hope of recovery and realization, or may have been the obligations of enterprises in the Russian Zone of Germany, entirely uncollectible. The plaintiff's assumption that one piece of sound money is worth to her only one-twentieth of the worth of the claim which she surrendered in return for that piece of sound money is unwarranted. For aught we know, the discrepancy might be in the opposite direction.

" The currency reform here in question was a sovereign act, reasonably calculated to accomplish a beneficial purpose, and if it did have any adverse effect upon the plaintiff, she cannot, under well-settled principles, shift that effect to the public treasury.

" The plaintiff urges that the fact that some claims, such as current labor claims, were collectible one for one, and most post-occupation claims were collectible one for ten, shows that her Reichmark claims were worth more than one for twenty. We think it would have been unreasonable to regard old claims against banks which must have been made hopelessly insolvent by the collapse of the Government and the invalidation of its bonds as equal in value to accounts which had been built up after the beginning of the occupation. Our bankruptcy and reorganization laws grade claims according to their worth and their social importance. They are not regarded as Governmental confiscation of the property of those who receive little or nothing because other claims have priority over them.

" It is not necessary for us to decide whether the fact that the property here in question was outside the United States would be a bar to the plaintiff's claim."

[Reports: 127 Ct. Cl. 323; 117 F. Supp. 197.]

Belligerent Occupation—Judicial Functions of Occupant—Occupation Tribunals—Sentence of Imprisonment by Occupation Tribunal—Execution of Sentence Entrusted to Authorities of Occupied Country—Assisting Escaped Prisoner—Whether Criminal Offence Under Municipal Law—The Law of Germany.

PRISON ESCAPE (GERMANY) CASE.

German Federal Republic, Federal Supreme Court. January 15, 1954.

THE FACTS.—Section 257 of the German Penal Code provides that a person who knowingly assists a criminal in order to save him from being punished for a criminal offence shall be guilty of " giving aid and comfort ". The appellants gave shelter to one H. who had been sentenced to a term of imprisonment by a French military court in occupied Germany and who, while serving his sentence in a prison administered by the German authorities, had suceeded in making good his escape. On behalf of the appellants, it was contended that to give shelter to a person sentenced by a foreign court was not a criminal offence. On behalf of the prosecution, it was contended that, notwithstanding that the escaped prisoner had been convicted by a French military court, the offence committed by the appellants was one directed against the German prison authorities who were responsible for his custody and against the German police who were responsible for his apprehension, and that the appellants had therefore been properly convicted of " giving aid and comfort " to H.

Held: that as the Occupying Power had instructed the German authorities to carry out the sentence, the appellants had interfered with the execution of a sentence by the German authorities and had accordingly been properly convicted, and that the fact of the sentence having been imposed by a court of the Occupying Power was immaterial.

The Court said: " The Court below has found that H., who had been sentenced by a French Occupation tribunal in 1947 to a long term of imprisonment, escaped from the prison at W. in the autumn of 1950, and that the appellants gave him shelter and kept him in concealment in order to prevent his being apprehended by the police and to make impossible the continued execution of the sentence. The offence provided for in s. 257 of the Penal Code is capable also of consisting in the temporary prevention of the execution of a sentence. It is not excluded by the fact that it was an Occupation tribunal which passed the sentence on H., because the occupation authorities caused the sentence to be executed in the prison of W. by the German prison administration. It is the duty of the German police authorities to search for the escaped prisoner, and they were, in fact, trying to apprehend H. The activity of the appellants was directed against the said measures taken by the

German authorities in execution of the sentence. Accordingly, they are guilty of an offence against s. 257 of the Penal Code."

[Report: JZ, 9 (1954) p. 671.]

Belligerent Occupation—Tribunals of Occupant—Whether Foreign or Domestic Tribunals—Conviction for Criminal Offence by Tribunal of Occupant—Whether Conviction Constitutes " Previous Conviction " in Subsequent Proceedings before Municipal Court —The Law of Germany.

PROBATION OF OFFENDERS (GERMANY) CASE.

German Federal Republic, Federal Supreme Court. March 5, 1954.

THE FACTS.—Section 23(3) of the German Penal Code provides, as far as here material, that a convicted person is not entitled to probation if within the previous five years he has been sentenced " in Germany " (*im Inland*) to terms of imprisonment of a total of more than six months. A German Court found the accused guilty of a criminal offence, and the question then arose whether the Court was precluded from putting the accused on probation, having regard to the fact that within the previous five years he had been sentenced to a term of 18 months' imprisonment by a British military court exercising jurisdiction in that part of Germany which was occupied by the United Kingdom.

Held: that the sentence passed by the British military court was not a sentence passed " in Germany " within the meaning of s. 23(3) of the German Penal Code, and that the German Court was therefore not precluded from putting the accused on probation.

The Court said: " This sentence [passed by a British military court] would, by virtue of s. 23(3) of the Penal Code, preclude a suspended sentence for the purpose of probation if it had to be regarded as a conviction " in Germany " (*im Inland*). This is not the case.

" The Penal Code uses the term ' in Germany ' in several of its provisions, *e.g.*, in ss. 3, 7 and 244.[1] So far as concerns ss. 3 and 7, it is generally agreed that the term has only territorial significance. So far as concerns s. 244, the Supreme Court (Reichsgericht) has held that only ' similar convictions in the exercise of German jurisdiction ' are capable of forming the basis of recidivism. These requirements are not satisfied in the case of tribunals of the

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[1] Section 3 provides that German criminal law shall apply to offences committed by German nationals, irrespective of whether such offences have been committed " in Germany " or abroad; section 7 provides that a sentence served abroad shall be set off against the punishment to be inflicted in respect of the same offence where in respect of the latter a further conviction is recorded " in Germany "; and section 244 provides for more severe punishment of a person convicted of larceny or robbery where that person has, within a certain period of time prior to such conviction, been convicted " in Germany " of a similar offence.

Occupying Powers.[1] Having regard to the fact that a previous conviction may enure to the disadvantage of an accused in the case of the application of s. 23 of the Penal Code to the same extent as in the case of the application of s. 244, only a judgment of a German court is capable of precluding suspension of sentence in accordance with s. 23(3). This is the only guarantee that similar cases will be decided in a similar manner, bearing in mind that the jurisprudence of the occupation tribunals deviates in some respects from that of the German courts."

[Reports: BGHSt, 5 (1954), p. 370; JZ, 9 (1954), p. 363.][2]

Belligerent Occupation—Judicial Functions of Occupant—Tribunals of Occupant—Whether Foreign or Domestic Tribunals—Criminal Proceedings before Tribunal of Occupant—Whether Subsequent Proceedings before Municipal Court Permissible on Identical State of Facts—Double Jeopardy.

DOUBLE JEOPARDY CASE.

German Federal Republic, Federal Supreme Court. May 21, 1954.

THE FACTS.—Criminal proceedings were instituted against the appellant before a German court. In the present appeal he contended that he was no longer liable to prosecution, on the ground that a French military court had already determined the same factual issues forming the basis of the proceedings now before the German court, and that it would be contrary to the generally accepted principle of *ne bis in idem* if he were now to be subjected to a further prosecution on the same set of facts. On behalf of the prosecution, it was contended that the principle of *ne bis in idem* applied only as between German courts and that, as French military courts operating in occupied Germany were not German courts, the prosecution were entitled to launch a prosecution before a German court on the same set of facts. On the hearing of the present appeal it became apparent that the proceedings before the French military court might still be pending and that the present appeal had been conducted on the assumption that the French military court had acquitted the appellant.

Held: (i) that the French military court did not exercise German jurisdiction, and that as the principle of *ne bis in idem* applied only as between German courts, the appellant was still liable to prosecution before a German court; (ii) that, having regard to the failure of the Court below to inform itself or the Supreme Court of the outcome of the proceedings before the French military court, the case must be sent back in order that the verdict of the French military court might be ascertained; (iii) that in the event of it being found that the French military court had sentenced the appellant to a term of imprisonment and that the appellant had, in fact, served such term, the period so served would be deducted from any sentence which a German court might in future impose, in accordance with s. 7 of the German Penal Code.[1]

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[1] *Cf.* the decision of the Federal Supreme Court of October 25, 1951; reported in NJW, 1952, p. 151.

[2] The Higher Bavarian Court of Appeal, in a judgment dated September 7, 1954, adopted the same principle in application of the Law of Amnesty of July 17, 1954 (JZ, 9 (1954), p. 709), *i.e.*, it ignored, for the purpose of granting an amnesty, a conviction previously recorded against the accused by an Occupation tribunal.

The Court said: "The appeal is based on the contention that the verdict of the French military court has extinguished the German right to prosecute to the extent that it has determined the issue of fact. According to this view, the rule of German criminal procedure that a court is not entitled to determine again an issue which has already been determined by another court applies to some extent also as between a German court and an Occupation tribunal. During the early post-war period most of the District Courts of Appeal (*Oberlandesgerichte*) adopted this view, thereby following the jurisprudence of the Supreme Court of the Reich (*Reichsgericht*)—which, incidentally, was not uniform—at the time of the occupation of the Rhineland. This Court is unable to follow that view. Only judgments of German courts are capable of extinguishing the right to prosecute. It follows that a decision of a French military court can preclude a continuation of the present proceedings against the appellant only if the Occupation tribunals exercise German jurisdiction. This, as the Supreme Court has repeatedly pointed out, is not the case. The cases previously decided by this Court establish the general principle that the Occupation tribunals do not exercise German jurisdiction, not even when they apply German law. This principle must be followed. The powers of the Judicature form part of the powers of the State. Therefore, only courts which derive their powers from German State power can exercise German jurisdiction. This does not apply to the tribunals of the Occupying Powers. They owe their existence exclusively to the will of their own State and derive their powers of jurisdiction solely from that State. They are therefore foreign courts within the meaning of German criminal law, even if they exercise jurisdiction in German territory, because the national status of a court can be determined only by the powers vested in the State from which that status is derived. For this reason—and contrary to the view expressed by the Supreme Court of the Reich—the fact that judgments of the Occupation tribunals also serve German interests cannot be relevant in an individual case. . . The District Courts of Appeal (*Oberlandesgerichte*) regard the judgments of the occupation tribunals as being identical in status with the judgments of German courts when they determine the facts of a case exhaustively, that is, when they determine the facts also in accordance with German criminal law. This, too, cannot be decisive, because even when the Occupation tribunals apply German substantive law they do so in accordance with rules of procedure which are alien to German law; and they do so, though not exclusively, in order to protect the Occupying Power. This consideration precludes us from treating their judgments as being identical with the judgments of German courts so far as concerns the right to prosecute. The accused does not suffer any injustice by reason of such different treatment, having regard to the fact that if he has served a sentence passed by the Occupation tribunal, such sentence must be deducted from that imposed by a German court. To that extent s. 7 of the German Penal Code—contrary to the view of the Higher Court of Appeal of Bavaria—is applicable by analogy. The principle of *ne bis in idem* precludes an offence from being punished twice. Where this principle does not apply, *i.e.*, as between the jurisdiction of foreign and German courts, s. 7 of the Penal Code requires that in the result, and for reasons of equity and justice, the accused shall be treated as if only a German court were adjudicating in the acts committed by him."

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[1] This section provides that a sentence served abroad shall be deducted from the sentence imposed by a German court, in the event of a further conviction being recorded in Germany for the same offence.

[The Court then dealt with the inadequacy of the evidence adduced as to the previous proceedings before the French military court, and continued:] "Should it be found that the proceedings before the military court are still pending, then this finding could not preclude the continuation of the proceedings before the German court because, just as the requirement of *ne bis in idem* before a German court only precludes proceedings in cases where a final judgment has been given by another German court, so only the fact that criminal proceedings in the same matter are pending before a German court precludes proceedings before another German court."

[Report: JZ, 9 (1954), p. 614.]

Belligerent Occupation—Judicial Functions of Occupant—Tribunals of Occupant—Whether Foreign or Domestic Tribunals—Previous Conviction by Tribunal of Occupant—Law of Amnesty in Occupied Country—Law Precluding Amnesty for Persons Previously Convicted—Whether Previous Conviction by Tribunal of Occupant Precludes Amnesty—The Law of Germany.

German Amnesty Case.

German Federal Republic, Court of Appeal of Hamburg.
August 19, 1954.

The Facts.—The Amnesty Law of the Federal Republic of Germany of July 17, 1954, provided, as far as here material, that persons previously sentenced to terms of imprisonment exceeding one month were not entitled to the remission of current sentences in accordance with the terms of the Law. The appellant, against whom a previous conviction involving a sentence of 12 months' imprisonment had been recorded by an Occupation tribunal, contended that this sentence should be ignored as being the sentence of a foreign Court, and that he should be deemed to be a person without previous convictions. The prosecution contended that the sentence inflicted by the Occupation tribunal should be taken into account as if it were a sentence imposed by a German court.

Held: that the Occupation tribunal was a foreign court whose sentence must be ignored. The appellant must be treated like a person without previous convictions and therefore was entitled to the benefits of the Amnesty Law.

The Court said: " The exception contained in s. 2(3), whereby remission of sentence may not be granted if there have been previous convictions involving a sentence of imprisonment exceeding one month, does not apply in this case. It is quite true that the accused was sentenced to 12 months' imprisonment on July 26, 1948, but this sentence was passed by the Control Commission Court of Lübeck. It was passed because the accused was found guilty of the unauthorized possession of Allied property. Such a conviction must be disregarded; only previous convictions recorded by a German court can be taken into account so far as concerns the application of s. 2(3) of the Amnesty Law. It is quite true that this interpretation does not follow directly from the wording of the section, which does not even contain the limiting words ' in Germany ' (*im Inland*), which are to be found in some of the provisions of the Penal Code. We cannot, however, attach decisive importance to this fact, because the parliamentary debates do not lend any support to the assumption that the significance of previous convictions recorded by foreign courts or Occupation tribunals has ever been considered and that the wording of section 2(3) was chosen deliberately. In interpreting this provision, therefore, we must apply those principles which apply in other cases in which, according to relevant legal provisions, the previous convictions of an accused lead to results disadvantageous to him. This is the case where recidivism according to s. 244 of the Penal Code is concerned.[1] According to the wording of the section, only previous convictions obtained ' in Germany ' (*im Inland*) bring about the results therein provided. So far as concerns cases of this kind, it is generally recognized that a conviction obtained before an Occupation tribunal, notwithstanding that it has been obtained in Germany in the territorial sense, is not a conviction obtained in Germany within the meaning of the section, because it has not been obtained in the exercise of German jurisdiction. . . . Criminal proceedings before foreign courts and Occupation tribunals do not always satisfy the requirements which, from the point of view of the German administration of criminal justice, appear indispensable. If convictions obtained before such courts or tribunals were to be put on the same basis as convictions by German courts, the results in individual cases might be untenable. On the other hand, it is unthinkable that German courts should allow the effect of a conviction by a foreign court or an Occupation tribunal to depend upon an investigation into the value and reliability of foreign proceedings in individual cases. Such investigations could be carried out only to a very limited extent. This being so, it is better to accept the undesirable consequences resulting from an interpretation of s. 2 (3) of the Amnesty Law, which favours many accused, rather than to run the risk of inflicting injustice on accused persons in individual cases, a risk which might arise if judgments of foreign courts and Occupation tribunals were to be put on the same footing as judgments of German courts."

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[1] This section provides that a person twice previously convicted " in Germany " (*im Inland*) as a thief is liable, if convicted a third time, to be punished as a recidivist.

[Report: NJW, 7 (1954), p. 1697.[1]]

Belligerent Occupation—Administrative Functions of Occupant—Forced Sale of Private Property by Occupant—Sale to Municipality Created by Occupant—Whether Municipality as Originally Constituted Liable to Return Property after Departure of Occupant—The Law of France.

SOCIÉTÉ AU GRAND MARCHÉ *v.* VILLE DE METZ.

France, Court of Appeal of Nancy. February 10, 1954.

THE FACTS.—In 1942 and 1943, respectively, the Head of the German Civil Administration of the French town of Metz, which was then under German occupation, sold certain immoveable and moveable property belonging to the owners of a local department store to the municipality of " Gross-Metz ", which had been created by the German Occupation Authorities and which comprised, in addition to the original town of Metz, certain outlying districts. After the departure of the German Occupation Authorities the owners sued the municipality of Metz (which had reverted to its original status) for the return of their property, and for damages for loss caused by physical damage done to their property and by their inability to carry on business while deprived of the ownership and possession of their store. On behalf of the municipality of Metz, it was contended that the municipality as now constituted was not identical with the town of " Gross-Metz " created by the German Occupant, and was accordingly not liable.

Held: that the municipality of Metz was liable to the owners as being identical in law with the town of " Gross-Metz " established by the Occupant.

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[1] See, to the same effect, a judgment of the Bavarian Higher Court of Appeal of September 7, 1954, reported in NJW, 7 (1954), p. 1617.

The Court said in part: "Although these acts were carried out under abnormal conditions by a *de facto* authority which had taken the place of the legally established organs, they constitute none the less administrative acts involving the liability of the community on whose behalf the *de facto* authority acted. This is so even where the Occupant has himself appointed the administrative organs in an illegal and irregular manner. In view of the fact that the existence of a juridical person does not depend exclusively on its organs and is not affected by their modification, however caused and whether or not regularly effected, such modification was merely the internal transformation of an entity which continued to exist without there being any substitution of one juridical person for another. It follows that the City of Metz has not ceased to exist as a juridical person of public law, notwithstanding the factual annexation (*sic*) imposed by Germany."

[Report: *Dalloz*, 1954, *Jurisprudence*, p. 136.]

Belligerent Occupation—Administrative Decrees of Occupant—Acts Performed in Compliance with—Subsequent Declaration of Invalidity of Decree—The Law of Holland.

British and Polish Trade Bank A.G. *v.* Handelmaatschappij Albert de Bary and Co.

Holland, Court of Appeal of Amsterdam. June 17, 1954.

The Facts.—When the German forces invaded Danzig in September 1939, the majority of the Board of Directors and the Managers of the British and Polish Trade Bank, the seat of which was in Danzig, fled to London, where the Management established themselves as bankers. The Bank then had a credit balance with the Handelmaatschappij Albert de Bary & Co., a bank established in Amsterdam. The German-appointed "Gauleiter" for Danzig, one Forster, appointed, on September 2, 1939, one Rehbinder as "Staatskommissar" of the British and Polish Trade Bank. On September 4, 1939, Rehbinder dismissed the Management and the Board of Directors and on September 9 informed de Bary that he now was competent to exercise all executive powers in respect of the British and Polish Trade Bank. He also required de Bary to transfer the said credit balance to a designated bank in Danzig. On September 18, 1939, de Bary replied that they would not comply with this request. In January 1940, de Bary received instructions from the Management of the Bank in London to convert its guilder balance into dollars and to arrange a transfer to New York. De Bary informed the Management in London that Rehbinder had also claimed the balance, and that legal advice was being sought on the question as to which claimant was entitled to payment. In March 1940, the London Management once more demanded that de Bary effect the transfer of the balance to New York and also notified them that they would be held liable for any damage arising from non-compliance with this demand. When German forces invaded the Netherlands in May 1940, the balance was still held by de Bary. In June 1940, the claimant bank in Danzig and the German Commissioner appointed at the Netherlands Bank at Amsterdam—which was the circulation bank of the Kingdom—brought pressure to bear on de Bary. The latter thereupon transferred the balance on November 21, 1940, to the Reichsbank in Berlin, to the credit of the Danzig bank.

In September 1948, the Registration Court in Danzig (which had now become part of Poland) appointed the Bank Gospodarstwa Krajowego in Warsaw as the liquidating agent of the British and Polish Trade Bank which, according to its Articles of Association, was still established in Danzig. In the present action the only remaining Manager, who had fled to London in 1939, brought a claim against de Bary for payment of the balance to him. This claim was dismissed by the District Court of Amsterdam on the ground that the claimant could not be identified with and could not be considered a successor in title to the British and Polish Trade Bank, which under its Articles of Association was still established in Danzig. The claimant appealed to the Court of Appeal of Amsterdam.

Held: that the judgment of the Court below must be quashed but that, for different reasons, the claim must be rejected.

The Court said: " By virtue of Chapter 10 (8) of the Declaration of Potsdam of August 1945, the territory of the former Free City of Danzig was brought under the administration of the Polish State. Pending the conclusion of a Peace Treaty with Germany this administration has been recognized *de facto* by the Netherlands. Following an Order of the Danzig Registration Court, the Polish Ministry for the Treasury decided on August 31, 1948, to wind up the British and Polish Trade Bank. That Court then appointed the Warsaw Bank as the liquidating agent. The appointment of the Bank Gospodarstwa Krajowego as liquidating agent and the winding up of the Bank in Danzig are legal acts in accordance with Polish law, which obtains in the present case. Therefore, it must be assumed that the Polish agent was entitled to authorize the Manager in London to institute and conduct the present proceedings. There also was evidence of such authorization. The Manager, therefore, was entitled to bring this action as a duly authorized agent of the rightful liquidating agent. De Bary, on the other hand, had adopted a correct attitude in retaining the balance and in not carrying out the instructions of Rehbinder or of the Managers in London. The latter were no longer in any way connected with the Bank, which, according to its Articles of Association, remained established in Danzig. De Bary therefore, were not in default when they did not carry out the request made in March 1940. By transferring the balance to Berlin on November 21, 1940, de Bary were validly discharged. The German Ordinance No. 179/1940 [1] was then in force. Although this Ordinance has been placed on List A, referred to in Article 16 of the Royal Decree on Occupation Measures (No. E 93),[2] and therefore must be deemed never to have applied, this does not alter the fact that under the terms and provisions of this Ordinance de Bary at the time were forced to perform their obligation of paying in the manner described in the Ordinance. By virtue of Article 1 of Ordinance No. 179/1940 Rehbinder, the appointed "Staatskommissar" of the British and Polish Trade Bank, a bank in the Greater-German Reich of which the City of Danzig then formed a part, was solely and exclusively entitled to claim the balance held by de Bary. De Bary therefore had to recognize Rehbinder as the sole person entitled to collect the debt. By transferring the balance, through the Reichsbank, to the bank in Danzig designated by Rehbinder, de Bary were discharged in accordance with Article 33, para. 1, of the Royal Decree on Restoration of Legal Relations (No. E 100)."[3]

[Report: N.J., 1954, No. 646.]

Belligerent Occupation—Delegation of Administrative Functions of Occupant to Authorities of Occupied Country—Exercise of Functions in Pursuance of Delegation—Whether Courts of Occupied Country Competent to Enquire into Propriety of Exercise of Functions by Local Authorities—The Law of Austria.

JEWISH REFUGEE (AUSTRIA) CASE.

Austria, Constitutional Court. June 19, 1954.

THE FACTS.—From 1951 until 1954 the appellant was an inmate of a camp established by the Jewish Joint Distribution Committee in Austria for the reception of Jewish refugees. This Committee was under the control of the United States occupation authorities in Austria, and some time before 1954 the latter authorized the Austrian Ministry of the Interior to close the camp. The appellant refused to leave the camp and was thereupon forcibly removed by Austrian police officers. He now appealed against his forcible removal, and contended that such removal without an order of the Austrian courts was unlawful. The Austrian Ministry of the Interior contended that as the appellant had been removed on the authority of the occupation authorities—which was tantamount to a removal by the Occupant himself—the Court was not entitled to exercise jurisdiction in the matter.

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[1] Ordinance No. 179/1940 was a decree of the German Commissioner for the occupied Netherlands territories. Art. 1 of the Ordinance laid down that as regards the competence to perform legal acts connected with carrying on a business established in the Greater German Reich—including the Protectorate of Bohemia and Moravia—or in the Government-General for the occupied Polish territories, only the law obtaining in such territory was conclusive. It further provided that this applied in particular to such persons as had been entrusted by the authorities competent in those territories, as administrator, commissioner or comptroller, with administering and managing a business.

[2] The Royal Decree on Occupation Measures issued by the Netherlands Government-in-Exile in London, *inter alia*, divided the legislative measures enacted in the occupied territories by or on behalf of the Occupying Power into three groups: (*a*) legislation which, being contrary to public international law, was considered as having been null and void *ab initio*; (*b*) legislation to which binding force was not denied for the duration of the occupation; (*c*) legislation which was maintained for the time being. Category (*a*) was placed on List A annexed to the Decree, and Ordinance No. 179/1940 was included in that List.

[3] Art. 33, para. 1, of the Royal Decree on Restoration of Legal Relations provided that a debtor who was under an obligation to make payment to a certain creditor but who had during the occupation, by virtue of a then existing obligation, paid the debt to another person, was to be considered as discharged from that debt.

Held: that the Court was not competent to exercise jurisdiction.

The Court said: " The United States Legation in Vienna informed the Ministry of the Interior on June 3, 1954, that the matters referred to in Article 5 (v) of the Control Agreement (*viz.*, matters concerning the care and removal of displaced persons, as well as the exercise of legal authority over them) were under the sole authority of the Occupying Powers, and that the Austrian Government when taking any measures concerning the care and removal of displaced persons, was acting by virtue of the express authority of the competent Occupying Power. It follows that the removal of the appellant concerned a matter falling within the framework of Article 5 (v) and was thus authorised by the American Occupying Power. In law, the appellant's removal must accordingly be regarded as if it had been carried out by the organs of the Occupying Power itself. It is therefore a matter removed from the competence of all Austrian authorities. The appeal must accordingly be dismissed on the ground that the Constitutional Court lacks jurisdiction."

[Report: Vf GH, 19 (1954), p. 454.]

Belligerent Occupation—Legislative Measures—Enforcement in Holland of Belgian Decree Providing for Restitution to the Belgian State of Money Paid in Pursuance of Illegal Acts of Occupying Power in Belgium.

See p. 23 (*Kingdom of Belgium* v. *Mrs. de V.*).

iii.—Respect for Private Property. The Public Property of the Enemy State. Requisitions and Contributions

Belligerent Occupation—Respect for Private Rights—Spoliation —Recognition in Neutral States.

See p. 25 (*Ammon* v. *Royal Dutch Company*).

C.—WARFARE AT SEA

IV.—Prize Law

War at Sea—Prize Law—Ships as Booty—Necessity for Proceedings in Prize.

See p. 473 (*Framnaes Shipyards Inc.* v. *Norwegian State* (*Ministry of Industry*)).

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